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MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-127

Rolf Topik, Henry Moskowitz, Stanley Schwartz, Mary Johnson, Richard and Christina Smith, individually and in behalf of all other Holders of Freely Tradeable Common Stock of Electronic Aids, Inc., a Maryland Corporation,

Petitioners,

v.

Catalyst Research Corporation, Mine Safety Appliances Company, Milton G. Hulme, Jr., George H. Deike, Jr., John W. Carville, Eugene W. Merry, John T. Ryan, Jr. and Electronic Aids, Inc., a Maryland Corporation.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(Docket No. 72-1846)

JAMES V. JOY, JR.
Attorney for Petitioners
60 East 42nd St.
New York, N.Y. 10017

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (Docket No. 72-1846)

Petitioners Rolf Topik, Henry Moskowitz, Stanley Schwartz, Mary Johnson, Richard and Christina Smith pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals entered in the above entitled case, Docket No. 72-1846, on February 6, 1973 (App. B1), as affirmed on reargument by Order entered on March 16,

1973 (App. B3).

(Contemporaneously, in companion cases: 1) Donald F. Hayne prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered in the case of Donald F. Hayne v. The Boeing Company, Docket No. 72-1261, on May 8, 1973 (App. C1); and 2) S. Wallach Company, Inc., prays that a Writ of Certiorari issue to review the Order of the Court of Appeals of the State of New York entered in the case of S.Wallach Company, Inc. v. International Business Machines Corporation, Docket Mo. No. 286, on July 2, 1973 (App. D1).)

Opinions Below

Topi k v. Catalyst

The United States District Court for the District of Maryland (*per* James R. Miller, D.J.) granted summary judge ment to Respondents in an unreported oral opinion dictated in open court on March 23, 1972, the transcipt of which is printed in Appendix B hereto, *infra* (App. B3). On May 12, 1972 District Court denied a motion by Petitioners under Rule 59 FRCP in an unreported Order, a copy of which is printed at (App. F4). Respondents moved in the Court of Appeals for the Fourth Circuit to dismiss Petitioners' Appeal as untimely. Their motion was denied by the Court of Appeals in an unreported order, a copy of which is printed at App. B26 The Orders of the United States Court of Appeals for the Fourth Circuit affirming the summary judgment entered by the District Court and denying Petitioners' Motion for Reargument, were made without opinions and copies of said orders respectively dated February 6, 1973 and March 16, 1973, are printed at App. B1 and App. B2.

Hayne v. Boeing

At the close of Plaintiff's evidence, at a trial, the United States District Court for the Northern District of Illinois, Eastern Division (*per* William J. Bauer, D.J.) granted Defendant's motion for a directed verdict, after denying a Motion for a Mistrial made by Plaintiff on the ground that denial of discovery in the case had prevented Plaintiff from present-

ing a *prima facie* case. The Order of the District Court was dated January 25, 1972, is unreported and is printed at App. C . The Order and Opinion dated May 8, 1973 of the United States Court of Appeals for the Seventh Circuit are unreported ported and are printed at App. C1.

Wallach v. IBM

The New York Supreme Court, Westchester County (*per* Joseph F. Hawkins, J.S.C.) granted "Accelerated Judgment" dated February 18, 1972, in an unreported memorandum, which is printed at App. D4. The New York Supreme Court, Appellate Division, Second Department, affirmed the lower court on February 5, 1973 in an Order without opinion, reported at ––F.2d––, which is printed at D1. The Appellate Division also denied a Motion for Reargument in an Order without opinion dated April 4, 1973, which is printed at App. D3. The New York Court of Appeals denied Plaintiff's Motion for Leave to Appeal in an unreported Order dated July 2, 1973, which is printed at App. D1.

Jurisdiction

Topi k v. Catalyst

The Order of the United States Court of Appeals for the Fourth Circuitdenying reargument as aforesaid was made and entered on March 16, 1973. By Order of this Court, Petioners' time to file this Petition for Certiorari was extended to July 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Hayne v. Boeing

The Order of the United States Court of Appeals for the Seventh Circuit as aforesaid was made and entered on May 8, 1973. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1)

Wallach v. IBM

The order of the New York Court of Appeals as aforesaid was made and entered on July 2, 1973. No Petition for

Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Summary judgments, or judgments on the pleadings (the records are not clear as to which) were granted the Defendants in the *Topi k v. Catalyst* and *Wallach v. IBM* cases. A denial of pre-trial discovery led to a directed verdict at the end of Plaintiff's case in a trial on the merits in *Hayne v. Boeing*. All the Appellate Courts, with the possible exception of the New York Court of Appeals, placed themselves in the positions of trial courts considering motions for summary judgment.

1. Is the summary judgment procedure followed in the Federal court (Rule 56 FRCP) and in the state courts (e.g., New York Civil Procedure Law and Rules 3212) unconstitutional, under the Fourteenth and Fifth Amendments, as applied *in practice* against Plaintiffs in complex civil suits?

2. Are the discovery procedures of the Federal District Courts (Rules 26-37, FRCP) generally so strictly construed *in practice* against Plaintiffs in complex civil suits as to be unconstitutional, under the Fifth Amendment, since actions of District courts in considering defendants' motions for summary judgment and in making rulings at trials on the merits wrongly presume liberality of these rules and availability of proof from them?

3. Are the rules for content of decisions of courts of original jurisdiction so lax as to give those courts a free license, so frequently as to be unconstitutional under the Fifth and Fourteenth Amendments, to "write out of court" plaintiffs in complex civil actions?

4. Have appellate courts unconstitutionally, under the Fifth and Fourteenth Amendments, abdicated almost all matters to the discretion of courts of original jurisdiction to accomodate their assumed need to prune calendars and otherwise completely deferred to those courts?

5. Does a party to litigation have *right* to a *meaningful* "day in court?"

Constitutional Provisions and Statutes Involved

The Constitutional Provisions and Civil Procedure Rules involved are the Fifth and Fourteenth Amendments to the United States Constitution and Rules 31, 34, 56 and 59, of the Federal Rules of Civil Procedure (FRCP) and New York Civil Practice Law and Rules 3211, 3212, printed in Appendix A, *infra*.

Statement

Topik v. Catalyst

The complaint was served upon Respondent Catalyst in November of 1970 and eventually jurisdiction was acquired of the other defendants. The complaint consists of two claims. Under Claim I, for themselves and for all other holders of freely tradeable common stock of Electronic Aids, Inc., a Maryland corporation (EA-Maryland), as such shareholders existed at the time of the merger of EA Maryland into a newly formed subsidiary of American Standard, Inc. (AS), EA Delaware, Petitioners sought a fair allocation of the proceeds of the merger consisting of AS Common Stock. They specifically requested that 3,050 shares of the AS stock, of the 22,222 shares received by Catalyst be reallocated to them after being declared a constructive trust and be proportionately distributed among the public shareholders of EA-Maryland. Under Claim II, Petitioners sought $750,000 damages in behalf of EA-Maryland for that corporation having been restricted in its growth to that extent by torts and breaches of contract. (App. B10)

EA-Maryland offered 100,000 shares of common stock to the public on May 26, 1971 pursuant to an offering circular filed with the Securities and Exchange Commission. (App. B10) Petitioner Rolf Topik's company, R. Topik & Co., which is no longer in existence, acted as the underwriter.

Three years later, Respondent Mine Safety Appliances Company (MSA) entered into an option agreement with EA-Maryland to purchase 70% of the common stock of EA-Maryland. This option was transferred to an MSA subsidiary, Respondent Catalyst Research Corporation (Catalyst), which

exercised the option. (App. B10).

At the instance of MSA and Catalyst, EA-Maryland agreed with AS to become merged into EA-Delaware, an AS subsidiary that was being formed, in consideration of payment of 1 share of AS common stock for each 100 shares of EA Maryland common stock. (App. B10). As part of the merger agreement, the EA Maryland stockholders were sent notices of a special meeting of stockholders to be held in Baltimore on September 10, 1970. A proxy statement accompanied the notice of meeting asking the stockholders to consent to creation of a temporary issue of 8,500 shares of preferred stock to be given Catalyst in cancellation of $850,000 debt allegedly owed Catalyst by EA Maryland. For each share of its momentary preferred stock, Catalyst had agreed to accept 1.764 AS shares, or 14,994 AS shares on the merger of EA Maryland into EA Delaware. (App. B10).

The proxy statement was mailed to stockholders from EA Maryland's office in Pittsburgh on August 29, 1970. Labor Day 1970 fell on September 7, 1970, making the business week of August 31-September 4 be the last week of the summer when a large percentage of the EA Maryland stockholders could be expected to be on summer vacation. (App B18).

On Friday, September 4, 1970, Petitioner Rolf Topik obtained a hearing on a temporary restraining order, to delay the merger, in the United States District Court of Maryland before Judge Edward S. Northrop, who urged the parties to come to a settlement that would allow the merger to be consummated and would also preserve Mr. Topik's rights and the rights of the other stockholders for whom he was also seeking relief. (App. B10).

An agreement was reached recognizing the consideration being paid by AS to be fair and stating that Rolf Topik and Catalyst were in dispute over the *allocation* of the shares of AS between Catalyst and the public shareholder of EA Maryland. (App. B14).

But for the agreement of September 4, 1970, according to the Maryland appraisal statute, Annotated Code of Maryland, Article 23, Section 73, any shareholder of EA Maryland

who failed to dissent from the merger by September 10, 1970 would be bound by the merger and by the valuation provided in the merger agreement.

The parties to the September 4, 1970 agreement failed to agree on a reallocation of shares. In their answers to Petitioners' complaint, Respondents set forth an affirmative defense challenging their own right to waive the Maryland appraisal statute but otherwise never alleged that an attempt had been made by the parties to the September 4, 1970 agreement to waive the Maryland appraisal statute (App. B16).

Issue was joined after jurisdiction was eventually acquired over all the named defendants. Discovery was completed with permission given to all parties to file motions for summary judgment. (App. B18). The Plaintiffs' discovery yielded serious issues as to the makeup of the alleged $850,000 debt said to be owed by EA Maryland to Catalyst and plaintiffs also tendered a serious issue that holders of freely tradeable EA Maryland stock should be paid more per share of stock that the holders of restricted stock. (App. B18).

At the hearing on Respondents' motion, Judge Miller *sue sponte* stated that the September 4, 1970 agreement (App. B14), which was drafted by Respondents' attorneys, did not preserve the status quo for the public shareholders of EA Maryland, except as a security fund for the six days between the date of the hearing on the temporary restraining order and the date of the special meeting of shareholders. (App. B3-B7). Unopposed, Petitioners had always contended that the September 4, 1970 agreement unambiguously gave them the right to litigate valuation (The "allocation" of shares). (Complaint Par. 22, Catalyst Answer Par. 5; App. B16, B13). If the agreement admitted of another interpretation, Petitioners argued at the hearing on the motion for summary judgment, it was at the least ambiguous and thus there existed a genuine issue of material fact. Summary judgment was nevertheless granted in an oral opinion dictated from the bench in the presence of counsel for all the parties. (App. B3).

Within the 10-day period provided in Rule 59 FRCP and, without a transcribed copy of Judge Miller's decision, Petitioner filed a motion under Rule 59 FRCP to vacate the sum summary judgment and, at the minimum, that there should be a threshold trial to determine whether the signatories to the September 4, 1970 had intended to waive the Maryland appraisal statute. (App. B1, B18). Judge Miller in his oral opinion had assumed that the statute *could* be waived but determined that *had not* been waived. (App. B4).

Respondents never replied to Petitioners' Rule 59 FRCP motion.

Judge Miller let the 30-day period for appeal from his March 23, 1972 decision run and then declared invalid Petitioners' Rule 59 FRCP motion. Instead he treated Petitioners' motion as having been filed under Rule 60 FRCP, which he denied without stating reasons. (App. F4). For this he was criticized in an Order of the United States Court of Appeals for the Fourth Circuit by Judge Sobeloff, denying a motion to dismiss Petitioners' appeal to that court as untimely because because filed only within 30 days of Judge Miller's action on the Rule 59 FRCP motion. In response tp Respondents' motion to dismiss, Petitioners sought mandamus to require Judge Miller to address himself to the merits of their Rule 59 FRCP motion. (App. B26).

After denial of Respondents' motion to dismiss it seemed clear that the Court of Appeals for the Fourth Circuit was holding the case, and not issuing the mandamus, because it was ready to hold that the September 4, 1970 agreement unambiguously preserved Petitioners' right to seek a reallocation of the AS shares, or that a threshold trial would be ordered on the question of interpretation of the September 4, 1970 agreement, or, finally that, at the very least, Judge Miller would be ordered to consider the merits of the Rule 59 FRCP motion.

However, Judge Sobeloff's wife died and he was replaced by Judge Field, who did not hear the oral argument of the appeal but was said to have later listened to it on tape.

Accordingly, the United States Court of Appeals affirmed without opinion and denied Plaintiffs' motion for reargument without ever having even referred to the Mandamus petition. (App. B1, B2).

Hayne v. Boeing

The complaint in *Hayne v. Boeing* also consists of two claims. The first claim was asserted under the antitrust laws and the second claim was asserted in tort to recover damages for: a) being "blacklisted" by Respondent, the Boeing Company, his former employer; and b) the invasion of plaintiff's privacy by detectives hired by Boeing to make their surveillance of him obvious.

These activities towards Mr. Hayne are alleged to have been intended to intimidate him and prevent him from testifying in person at the trial in New York of the *Costello v. Pan American World Airways and Boing Co.* case[1], and also as punishment of him for cooperating with the plaintiffs in that case. (App. C1). Although he was deposed, he did not testify in person at the trial. (App. C1).

Boeing's answer was filed on March 25, 1971 (RII[2] p14) and was accompanied by a motion to dismiss the First (Antitrust) claim of the complaint. (RII p14). The assigned judge, Judge A.L. Marovitz, decided the motion to dismiss on April 9, 1971. (RII p35). By order of May 18, 1971 (RII p 37), he ordered that discovery, none of which had been commenced by either party, be completed by July 18, 1971.

During a span of three days in June, Boeing deposed Mr. Hayne and his attorney, who had come from New York City for the depositions, deposed Richard Williams, who had been attorney for Boeing in *Costello* litigation. Mr. Williams admitted investigation of Mr. Hayne by detectives hired by Boeing in the *Costello* litigation. (App. C14).

Boeing's counsel in the *Hayne v. Boeing* case prevented Mr. Williams from testifying as to the identity of the detectives or the contents of the detectives' reports on the ground that the reports would speak for themselves (App. C14) and he refused to produce the reports, which were in his posses-

1. RI is the Court of Appeals Appendix in *Topik v. Catalyst;* "RII" is the Court of Appeals Appendix in *Hayne v. Boeing;* RIII is the New York Appellate Division Appendix in *S. Wallach Co. v. IBM.*

2. Docket No. 63 Civ. 2845(MP), Southern District of New

sion for use in the deposition of Mr. Williams. (App. C14).

The transcript of Mr. Williams deposition did not become available until September 1971 (RII p109), or more than six weeks after the July 18, 1971 date set in Judge Marovitz' order of May 18 as the close of discovery.

When voluntary production of the detectives' reports was refused, Mr. Hayne served a motion under Rule 34 FRCP for their production. (App. C9). This motion was orally opposed by Boeing's Chicago counsel, who did not submit papers in opposition (RII p109, 121-122). Judge Marovitz denied the motion. (App. C10).

Mr. Hayne served interrogatories on Boeing, which refused to answer most of the interrogatories on the ground that Judge Marovitz' ruling on the Rule 34 FRCP motion made answers to the interrogatories unnecessary (App. C10).

The Pretrial Order stated that Mr. Hayne would call as witnesses detectives who investigated Mr. Hayne (App. C19). The Pretrial Order was signed by Judge Marovitz, who was replaced by Judge Bauer just before the Pretrial Conference (RII p49).

At the Pretrial Conference, Judge Bauer was urged to overrule Judge Marovitz' ruling that had precluded discovery of the identity of the detectives or that he should certify this discovery question to the Court of Appeals under 28 U.S.C. 1292. Judge Bauer said that he could not change the ruling of another judge and declined to certify the case for an interlocutory appeal (RII pp89, 110-111).

Trial before a jury commenced on January 24, 1972 (RII p50). In his opening statement, Mr. Hayne's attorney said that he would be trying the case on the basis of an inference to be drawn from the refusal of defendant to call its detectives as witnesses (RII p53). Counsel started to ask the jury to be attentive to evidence of investigation of Mr. Hayne so that it could form an opinion as to the need for Boeing to call the detectives as witnesses or suffer the inference.

He was interrupted by an objection from Boeing's attorney that was sustained (RII p53).

York. By the time of the decision on the merits, John England had succeeded Mr. Costello as the Plaintiff Trustee in Bankruptcy.

At a transcribed conference in chambers, Judge Bauer refused to allow Mr. Hayne's attorney to try the case on the theory of the inference from Boeing's failure to call the detectives as witnesses (App. C21).

"THE COURT: As I gather, you think the burden of proof will shift to Mr. Poust [Boeing's attorney] to demonstrate that these incidents that you are describing were not the result of the actions of the detectives of the attorney hired by Boeing?

"MR. JOY: That is right.

"THE COURT: Is that your theory?

"MR. JOY: That is the best I can do. I do not know how else, that we have got the ruling [by Judge Marovitz].

"THE COURT: I do not either *when I am faced with a fait accompli*. . . ."

(App. C24; italics added)

Mr. Joy made a motion for mistrial, based on the denial of the Rule 34 FRCP motion by Judge Marovitz. The motion was denied. (RII pp107-112).

This occurred at the close of Mr. Hayne's case and was followed by a motion by Boeing for a directed verdict, which was granted (App. C1).

Wallach v. IBM

The complaint seeks general, special and exemplary damages for a communication by IBM's Real Estate Construction Department (RECD) to a construction company, which had contracted with Wallach Company (Wallach) to be supplied computer-made Critical Path Scheduling (CPS), that Wallach's CPSs were unsatisfactory to IBM, the manufacturer of Wallach's computer equipment (App. D10)

S. Wallach Company, at the times involved herein, was a computer services company exclusively utilizing IBM computer equipment and specializing in CPS for the construction industry.

Stated simply, a CPS seeks to identify the activities of a construction project that will be required to be accomplished in order to complete the project and to identify the

sequence in which the activities must proceed as well as specifying the time that will be required to complete each activity. (App. D17).

There have been three generations of the CP Methods–Pert Method, I-J Method and Precedence Method (App. D). The first generation, the Pert Method, looks like a series of circles, resembling golf balls, connected by wires, the "golf balls" containing a description of the activity, and the "wires" the amount of time for the accomplishment of the activity. In the "golf ball" are the dates of start and stop of the activity. The second generation I-J CPS is a Logic Network Diagram, which contains in linear form the activities that must be accomplished, their dependence upon each other, and the time needed to complete them, both individually and as a unit. The third generation Precedence Method consists of two parts–a computer print out in language, rather than by diagram, of the activities, which activities must be accomplished before others may begin, and the tim e perid involved in their completion; a time scaled-bar derived by a computer from the information developed in the first part and set forth on a computer-driven On Line Plotter. (App. D17).

The development of Precedence CPS came about as the result of the introduction by IBM of its third-generation computers, specifically the IBM 1130, an engineering computer (App. D17), which Wallach purchased from IBM.

This disparagement of Wallach's work, admitted by IBM's RECD (App. D10) appears to have arisen from the format of Wallach's Precedence CPSs, which the RECD personnel did not understand. (App. D17).

Wallach developed its own program for CPS to be generated on its IBM 1130 computer because IBM had not yet developed CPS programs for the computer when Wallach bought it in 1966. The program subsequently developed by IBM was substantially the same as Wallach's program (App. D17).

Wallach became involved in a dispute between a general contractor, which was ordered to do additional construction work by IBM over and above its contract. IBM refused to recognize CPS costs relative to the changed work

as an additional cost. Up to this time, IBM had been promising construction contractors that computer time would be made available to them for updating CPS work but was unable to provide the computer time making it necessary for the general contractors to go back for updating and revisions to companies that had originally provided the CPSs. The dispute being related was between IBM and Fred J. Brotherton Construction Co. After the dispute with Brotherton, IBM found it necessary to change its standard bid documents to eliminate the reference to computer time from IBM. At this point in time, IBM's RECD, because of the time involved in the dispute and the embarassment of changing contract bid forms, began to criticize Wallach's work. (App. D17-19).

The communication complained of in the Complaint was by Mr. Rorich of IBM's RECD to the president of William L. Crow Construction Co., who terminated his contract with Wallach as a result of the conversation. (App. D 17-19).

At the beginning of October, 1971, IBM served a motion for "Accelerated Judgment" on Wallach returnable October 19, 1971 with affidavits but without a memorandum of law. IBM refused any longer than a few days forcing Wallach's attorney to request an extension of time to November 3, 1971. on the return day when service of the memorandum of law was also requested before the adjourned date. The extension of time to November 3 was granted but the application for the me memoradum of law in advance was denied because plaintiff should be able to figure out what would be in the memorandum. (App. D21).

Oral argument of the motion for accelerated judgment was heard on November 3 and Judge Hawkins granted the motion on February 18, 1972. (App.D4, D21). An omission by IBM in failing to annex copies of pleadings to its motion was allowed to be corrected by IBM, which received an ex parte communication from Judge Hawkins law secretary, who however failed to include the copies so received from IBM and relied upon by Judge Hawkins in rendering accelerated judgment in the files of the Supreme Court, Westchester County. (App. D23-D25). New York State does not follow

the practice of having pleadings filed from the inception of a case.

Reasons for Granting the Writs

In this petition, and in its two companion petitions, petitioners are painting a picture of crisis existing in the field of complex civil litigation, both in state and Federal courts.

Important innovations have been made in the last 40 years to permit courts of original jurisdiction to cope with the tidal waves of litigation that seemingly threaten to engulf trial courts. On their face these innovations are salutary. However, to the extent that their appearances belie their reality, such advances *pro tanto* are instruments of injustice. Plaintiffs, in complex civil litigation, are suffering from these innovations to the point where many of these innovations *in practice,* it is submitted, are unworkable and thus are unconstitutional.

Data processing is not available in detail to support petitioners' thesis, but counsel for petitioners has had so many experiences in a variety of complex civil cases that petitioners believe their thesis will be proven to a moral certainty. Besides the three companion cases in which Certiorari is being sought, petitioners will refer to nine other complex civil cases to prove their thesis.

According to the *1972 Annual Report of the Director of the Administrative Office of the United States Courts,* the causes of the termination of the 78,092 cases among private parties terminated in the Fiscal Year ending June 30, 1972 were as follows:

No Court Action	37, 107	47.4%
Court Action	32,967	41.1%
Trial	8,018	11.5%
	78,092	100.0%

(Table C-5).

No breakdown is given of the 32,967 cases disposed of

by "Court Action". It is not impossible that 16,000 of these dispositions were on Motions to Dismiss or on Motions for Summary Judgment.

The FY-1972 statistics on complex civil cases are as follows:

	Total	*No Court Action*	*Court Action*	*Trial*
Federal Contracts	1,700	867	936	97
Civil Antitrust	949	320	565	64
	2,649			161
				6.1%

as contrasted with uncomplex civil litigation:

Personal Injury Motor Vehicle	7,812	3,365	3,162	1,283
Personal Injury Other	5,194	1,914	2,315	893
Civil Rights	4,460	1,422	2,318	720
	17,464			2,896
				16.6%

(Table C-5A)

By citing these statistics, petitioners wish to point out that there is a threshold question of complexity in the antitrust and Federal contracts cases and that although there are occasional complex cases in the personal injury and civil rights fields, District court judges handle so many of them that they feel comfortable even with the complex cases from these latter groups.

There currently are many fallacies, it is submitted, premising our present system in civil cases:

a) Pretrial discovery is liberally granted to plaintiffs as well as defendants.

b) Motions to dismiss are denied where plaintiffs have

pleaded a cause of action.

c) A hearing on a motion for summary judgment is not in itself a trial on the merits but is only an inquiry into whether there exists genuine material issue of fact.

d) Substantial errors by courts of original jurisdiction will be corrected by Courts of Appeals.

e) Any person involved in litigation is entitled to his "day in court."

f) In trials without a jury, the judge will explain his decision in a decision that fairly reflects the contentions of the parties.

This petition for certiorari, and its two companion petitions, are intended to show to the Court that the foregoing are fallacious and that belief in them is destroying justice in complex civil cases. Looked at in isolation, each of the companion petitions for certiorari would stand a good chance of being denied as involving matters not sufficiently consequential. Their grouping together, petitioners submit, shows the existence of a crisis in civil litigation brought about by the desire to reduce calendars and not to come to grips with complex litigation.

1. *Discovery is not liberal for plaintiffs.* Petitioners submit that it is impossible in the U.S. District courts to obtain discovery of documents over the determined objection of defendants. *Hayne v. Boeing*, of the companion cases, illustrates this.

Two cases in the United States District Court for the Southern District of New York also illustrate this: *Mulvey v. Goldwyn Pictures* (Doc. M-8-85)[3], *Costello v. Pan American World Airways* (Doc. 63 Civ 2845MP)[4], and *Marcon Electronics Corp. v. The Budd Co.* (Doc.63 Civ. 2515).

The denial of discovery in Hayne v. Boeing prevented plaintiff from trying his case on the merits because he was suing for over-surveillance by detectives, amounting to an invasion of privacy, and Boeing refused to divulge the names

3. A pro ceeding in aid of litigation in the Central District of California (Doc. Civil 67-1634; see 433 F.2d 1073, 9th Cir.)

4. See Footnote 2.

of the detectives it admitted hiring to investigate Mr. Hayne. (App.C15,C10). The deposition of the attorney for Boeing, Mr. Williams, who hired the detectives was frustrated by Boeing's Chicago attorney on the ground that the detective's reports were the best evidence (App. C17), leading Mr. Hayne reasonably to conclude that those documents would be voluntarily produced and that Boeing would be estopped to object to their production. Later the documents were not voluntarily produced making it necessary for Mr. Hayne to file a motion under Rule 34 FRCP. (App. C8). This motion was only orally opposed on the ground that the documents constituted attorneys' work product. (RII p109). Judge Marovitz examined the documents *in camera* and denied their production as merely routine credit reports, meaning that they were not relevant but not reaching the question of whether they were "reasonably calculated to lead to the discovery of admissible evidence" in the words of Rule 26(b)(1) FRCP. Whatever objection might have been raised as to their eligibility for discovery was waived, it is submitted, by the positions taken by Boeing's counsel at Mr. Williams' deposition. (App. C15-18).

Judge Sylvester Ryan ordered production, in *Marcon v. The Budd Co., supra,* of a merger agreement selling Budd Electronics Corp., as a part of his decision on a motion to quash a subpoena duces tecum. At the deposition of a Budd officer following Judge Ryan's order, Budd continued to refuse to produce the agreement contending that it contained trade secrets, never explaining how a company that has sold a business retains trade secrets in the business. A motion to punish for contempt was brought on before Judge Ryan, who reversed his earlier order and refused to order production of the document. Instead he read from portions of it.

In *Costello v. Pan American, supra,* which involved Boeing 707-120 series jet airplanes, Pan American voluntarily produced a copy of its contract to purchase 707-320 series airplanes from Boeing but refused to produce a copy of its contract to purchase 707-120 series airplanes. Its objection to such production, on the ground of relevancy, was sustained by a Special Master supervising discovery. Costello was able

to obtain a copy of the contract for the 707-120 series aircraft from the Securities and Exchange Commission. It contained a unique "Most Favored Nations" clause thus showing the close relationship between Pan American and Boeing and making the document be extremely relevant.

In *Mulvey v. Goldwyn Pictures*, plaintiff was seeking documents from National Broadcasting Company (NBC) to prove the amounts paid for major feature-length movies shown on national television. NBC objected that it did not have documents exactly fitting the document category of a subpoena duces tecum and frustrated efforts to identify for production a small group of documents. NBC was a quasi-plaintiff because the block-booking method was foisting upon it mediocre films in order that NBC could obtain the few excellent films in a large block of films. A depostion failed to yield the information necessary to identify the documents. An early trial was imminent in California. Since the efforts to obtain discovery were at an impasse, Mulvey brought on a motion in New York to punish NBC for contempt in failing to honor the subpoena. The real purpose was to seek mediation by the court of the impasse. Judge Cannella referred the motion for contempt to Magistrate Gerard L. Goettel, who denied the motion for contempt and levied counsel costs of $750 against Mulvey. He made no effort to mediate the impasse in voluntary discovery. A few months later, the case was before him again in connection with an attempted Rule 60 FRCP motion. During the course of the later hearing, Magistrate Goettel said that had been regularly levying counsel fees, in even larger amounts on discovery motions. It is to be doubted whether the 24 judges of the Southern District of New York are aware of the breadth of Magistrate Goettel's diligence in levying costs on discovery motions.

The experience at the Armed Services Board of Contract Appeals and the United States Court of Claims is exactly the opposite. Documents are freely exchanged in those forums and oral discovery depositions are barred. Rules 14, 20, *Rules of the Armed Services Board of Contract Appeals* (App. F2-4).

In *Industrial Electronic Hardware Corp.*, 68-1 BCA Par. 6760, appellant attempted to preserve the testimony of government inspectors who were inspecting, it was assumed, units

produced by a repurchase contractor[5]. The government objected that such depositions would not be discovery in nature and promised that the inspectors would be witnesses at trial. If the depositions had occurred as requested, the inspectors would still be "inspecting" the product of the repurchase contractor. By the time of the ASBCA hearing, all the product of the repurchase contractor had been delivered. Only two of the inspectors testified at the hearing and revealed that the government had not been inspecting the product of the repurchase contractor but had been relying upon the repurchase contractor's quality assurance records.

In *Hayne v. Boeing* at the Court of Appeals for the Seventh Circuit, Appellant said in his Brief:

> "In researching this appeal, counsel has been uanable to find any case in which a Federal Court of Appeals has reversed a lower court judgment because of an improper ruling on discovery going to the heart of the case. A partial answer to this Point of Mr. Hayne's brief will be for Being's counsel to show that other lower court judgments have been reversed for disallowing reasonable discovery requests." (Appellant's Br. pp20-21).

In their answering brief, Boeing's counsel did not undertake to cite any cases where lower courts were so reversed. Accordingly, petitioners submit, there are no Federal cases in the last 30 years so holding where review is being made of judgments by U.S. District Courts.

All this proves two things: First, the potential of discovery is so vast that courts seek to restrict the scope of discovery; and, Second, it is impossible to obtain documents

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5. When a Federal contractor is terminated for default (i.e., his breach), the government has the right to repurchase against his account and any amounts paid in excess of the original contracts (hence the term "excess costs") are assessed against the original contractor. The main issue in the *Industrial* case was whether anyone could manufacture units to the government specification. Industrial was trying to show that the repurchase contractor also failed to meet the specification.

in the District courts over the determined opposition of defendants, who are not going to introduce the documents as part of their own cases.

The scope of questioning at trial presumes pretrial discovery has been liberal as do courts entertaining motions for summary judgment. At the Armed Services Board of Contract Appeals, hearings buttressed by multitudes of documents already of record, combine discovery and trial and yield fuller explorations of disputes. Some aspect of discovery has always been a part of trials, yet the supposedly liberal pretrial discovery rules limit this salutary aspect of trials.

2. *Many Motions to Dismiss Should Not Have Been Granted.* The United States District Court for the Southern District of New York dismissed the complaint in *R.E.D.M. Corp. v. Joseph LoSecco,* Doc. No. 33001, 2nd Cir., unreported 1969 decision. This was the case that was the forerunner of the *Scanwell* injunctions cases.[7] When it came time to try the REDM case at the ASBCA, it was found that the contracting officer, the basis of whose decision under the disputes clause of the government contract in question was being sought, had in his possession a report from a consultant contractor advising him that REDM's claim for additional compensation was valid. This was enough to cause a settlement immediately before trial at the ASBCA. The Assistant U.S. Attorney handling the case at the District Court afterward said he had not known of the consultant's report.

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7. The action sought to compel a contracting officer, by Mandamus to follow the Disputes clause of a defense contract and the implementing regulations. At oral argument of the appeal, the judges of the Second Circuit showed reluctance to render injunctive relief in connection with Federal contracts.

8. *Scanwell Laboratories v. Shaffer,* 424 F.2d 859 (D.C. Cir., 1971; *Steinthal v. Seamans,* 455 F.2d 1289;(1971); *Wheelabrator Corp. v. Chafee,* 455 F.2d 1306 (D.C. Cir. 1971.

At the Armed Services BCA, an appellant is entitled to a hearing, and to present live witnesses, even on motions to dismiss. The following ASBCA cases, *Alcar Instruments*, AS BCA No. 9171, 1964 BCA Par. 4281, *Viewlex, Inc.*, ASBCA No. 12584, 72-1 BCA Par. 8902, in which the appellants prevailed, would have been dismissed, it is submitted, if they had been the subjects of motions to dismiss in the United States District Courts.

In *Costello v. Pan American, supra*, the plaintiff, who eventually lost in a trial on the merits, successfully defended a motion to dismiss because Judge Pollack insisted on a threshold trial, in which witnesses testified. One ground for the motion to dismiss was collateral estoppel and the dialogue nature of the threshold trial brought out that the matter allegedly constituting collateral estoppel had not been argued or been the subject of evidene in the other proceeding being relied upon (in California).

A case is now pending at the Armed Services BCA, *R. E.D.M. Corp.*, ASBCA No. 17378, which will be decided before Respondents file their answers to these companion Petitions for Certiorari. Even if the case is decided against appellant, the Board opinion will demonstrate the the government's motion to dismiss was properly denied and the case deserved the hearing on the merits that has been completed.

3. *The Summary Judgment Procedure is Contrived and Artificial at Least Insofar a Plaintiffs in Complex Civil cases are concerned. Topi k v. Catalyst* shows the worst aspects of the Summary Judgment rule:

a) A defendant (e.g., Catalyst) need not support his motion for summary judgment with affidavits (Rule 56 (b) FRCP).

b) "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Rule 56(c) FRCP), which:

i) allows a judge to introduce an issue not fairly raised by a defendant's motion for summary judgment;

ii) allows a judge to call upon a plaintiff to cite evidence in the record;

iii) allows a judge to determine credibility of witnesses and affiants.

Hearings on motions for summary judgment are trials. Judges, who want to grant summary judgment (e.g., in order to get rid of complex and difficult litigation), can convert questions of fact into questions of law by stripping away enough top layers of "genuine issue[s] as to any material fact[s]" and eventually go down to subsidiary facts they find to be undisputed and thus find that the ultimate material facts no longer are disputed.

The other method of granting a desired summary judgment is to straddle the facts of a case by announcing a new or expanded rule of law, which is mainly what happened in *Billy Baxter Co.v. Coca Cola,* 431 F.2d 183 (2d Cir. 1970), cert. den. 401 U.S. 923), making the Second Circuit an *anti*-Antitrust enclave and causing local government entities (such as the City of New York) to file antitrust suits in the California Federal courts. In order to grant summary judgment for the defendants it was necessary for the District court judge to hold that as a matter of law intention indirectly to put a plaintiff out of business was not an issue in the case. Thus, in the Second Circuit, one can do something of an antitrust nature *indirectly* that is prohibited, if done directly. *R.E.D.M. v. LoSecco, supra,* means that the Second Circuit is at odds with another Circuit, the District of Columbia Circuit[7], in another area of complex civil litigation. This point of the District courts with the larger caseloads disposing of more cases without trials is borne out by the fact that the national average of cases disposed of by trial in FY-1972 was 9% but that the percentage of cases disposed of by trial in the Southern District of New York was only 4.5%, lowest of all the districts except Maasachusetts (2.7%) Western Wisconsin, Alaska, Arizona and Eastern California. Table C 4A, *1972 Annual Report of the Director,* Administrative Office

of the United States Courts.

In *Topi k v. Catalyst*, it was necessary for the District Court of Maryland and, inferentially, the Court of Appeals for the Fourth Circuit, to adopt a super-Parol Evidence rule condoning exclusion of evidence that the leading authorities on parole evidence have always allowed to be admitted even where the parol evidence rule, in its most rigorous form, is fully operative. ". . . all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean... . . " are always admissible. *Restatement of Contracts*, Section 230. "Previous negotiations between parties to an integrated agreement, whether the negotiations relate to that agreement or to another, are admissible to show that the agreement has any meaning which is not impossible under the standard stated in Section 230, though that meaning would not otherwise have been given to the agreement." *Restatement of Contracts*, Section 242. In other words, *all* external evidence is not *parol* evidence within the meaning of the parol evidence rule.

The action of the Fourth Circuit in the *Topi k* case is thus seen to have been a summary judgment review on its part of Petitioners' entire case. Also, in reviewing grants of summary judgment for defendants, the courts of appeals seem to treat the summary judgment cases no different than cases where appellants have lost after a full trial on the merits.

As in *Topi k v. Catalyst*, plaintiff in *Wallach v. IBM* was surprised at the oral argument and was not able to make effective oral argument.

The United States Court of Appeals for the Ninth Circuit, in *Dredge Corp. v. Penny*, 338 F.2d 456 (1964) said that the absence of oral argument on a motion for summary judgment that was granted required that the summary judgment be vacated. This case of the Ninth Circuit is not followed in the Second Circuit, where the losing plaintiff was not allowed oral argument at the District Court in *Billy Baxter v. Coca Cola, supra*, and in the Fourth Circuit, where the District Court on the day of the hearing introduced the issue of the

September 4, 1970 agreement (App. B14) as not being an agreement to preserve the rights of the EA Maryland stockholders. Accordingly, meaningful oral argument was not allowed in *Topi k v. Catalyst* and also was not allowed in *Wallach v. IBM.*

In *Wallach v. IBM,* IBM did not serve its memorandum of law until the day of oral argument. (App. D21). It had brought on the "Accelerated" judgment motion by a one-page notice of motion (App. D9) , accompanied by two short affidaits, neither of which disclosed whether a motion to dismiss or a motion for summary judgment was involved. IBM spent, it is reasonably believes, several months preparing its motion for "accelerated" judgment, a term devised by New York lawmakers to embrace both summary judgment and motions to dismiss, but IBM instructed its attorneys not to give plaintiff a 10-day adjournment of the motion. On the original return day, Wallach's counsel appeared at the Supreme Court, Westchester County and was granted the adjournment but the court denied a request that IBM serve its memorandum of law before the adjourned oral argument with the comment that counsel should be able to figure out what would be in it. (App. D21).

As stated, Wallach did not receive IBM's memorandum of law until the adjourned date. Its request for further oral argument, as the supposed substitute for a hearing on the merits was denied, and this fact was pressed as error in the appellate courts of New York State, citing *Dredge Corp. v. Penny, supra.*

In *Billy Baxter Co.,* at the District court, the judge insisted that a motion to amend the complaint be first argued by plaintiff, a motion that was orally granted. Next defendants orally argued the summary judgment motion, incidentally persuading the judge that he should reverse his ruling on the motion to amend the complaint, but the judge failed to hear plaintiff's opposition to the summary judgment saying he had run out of time. Billy Baxter's attorney wrote the judge in the seven months that intervened between oral argument and the filing of the decision granting summary judgment and requested oral argument, which was never granted on the summary judgment motion.

In New York State, pleadings are served but not filed until it is necessary to obtain an index number, which IBM had to do in order to notice a motion for summary judgment. The notice of motion for accelerated judgment was served on Wallach before the index number was obtained and did not have attached copies of the pleadings. Wallach's attorney called this to the attention of IBM's attorney, who said that copies would be attached. (App. D24).

A frequent ground for denial of summary judgment in New York is for failure to annex copies of pleadings.

Even after this advice from Wallach's attorney, IBM's attorneys did not attach copies of pleadings to the original of the motion. After Wallach's attorney filed his brief and appendix at the Appellate Division, Second Department, he was told to requisition the Court file from the lower court and cause it to be transmitted to the Appellate Division Although Judge Hawkins' opinion (App D24) referred to the complaint, the court file did not contain a copy of the complaint. Wallach's attorney telephoned IBM's counsel, who had succeeded the earlier counsel, about this and was told that the law secretary of Judge Hawkins *ex parte* had telephoned IBM's counsel for copies of the pleadings. (App. D24).

At oral argument at the Appellate Division, Second Department, Wallach's counsel first argued this omission and contended the absence of pleadings in the record vitiated the lower Court's summary judgment.

Accordingly, in addition to being required to oppose a motion for summary judgment with evidence, a plaintiff must be ready for:

a) Copies of the pleadings relied upon by the judge granting summary judgment not being preserved.

b) Not being allowed oral argument or, at least, meaningful oral argument.

c) Issues of fact being conveniently converted into new propositions of law.

d) Disputed issues as to material facts becoming undisputed.

e) The judge hearing the motion, *sue sponte*, raising

an issue not substantially raised by the motion papers.

Based on these factors, and factors listed at the beginning of this section 3, Petitioners respectfully submit that, *in practice*, the prsent Rule 56 FRCP and its counterparts in state statutes (e.g., Article 32, New York CPLR) are unworkable and deny plaintiffs in complex civil cases the due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Full account must be taken of the extreme breadth of the summary judgment rules and the pressures that trial judges are under to clear crowded calendars and dispose of cases.

Obviously, Mr. Topik and S. Wallach Co. are entitled to trials on the merits of their cases not simply as having suffered violations of the processes of the summary judgment rules but more fundamentally because the Federal and state summary judgment rules, in the overall context of crowded court calendars, breed such errors.

4. *The Courts of Appeals Are Delegating Wide Discretion to Trial Judges and Are Not Reviewing Exercise of Such Discretion.* As pointed out in earlier in section 2 of this Petition, it appears that no Federal appellate court has ever reversed a court of original jurisdiction for error in denying pretrial discovery. Surely such major errors occur, as occurred in *Hayne v. Boeing, supra.* The Court of Appeals for the Seventh Circuit relied upon Mr. Hayne's failure to have the detectives' reports sealed (App. C1). but fail to point out that on many occasions immediately afterward, Mr. Hayne sought to have the ruling corrected–by serving interrogatories, at the pretrial conference and during the trial itself. (App.C9, 10,19,21).

One is reminded of the many sections of the Uniform Code of Military Justice where the last words sound like a religious symphony ". . . and the penalty is death" for sleeping on the guard in time of war or refusing to obey an order of a commissioned officer during combat.

Petitioners understand that the Federal Courts of Appeals write opinions in only about 15% of the appeals heard by them. The Bar generally assumes that opinions are not written in cases where the appeals are frivolous pr are governed

by obvious and well understood rules of law. Counsel for petitioners, based on his experiences in the Topik, S. Wallach and *R.E.D.M. v. LoSecco , supra,* cases has come to believe that one of the most frequent reasons for failure to write an opinion is that the court of appeals failed to understand the facts of a controversy and thus felt that quasi-summary judgment should be rendered for appellees. If the Courts of Appeals attempted to write opinions in more of their cases affirming lower court decisions, they would find, it is submitted, that many of their decisions "would not write" and thus would find that their proposed affirmances were wrong.

5. *Lower Court Judges Trying Cases Without a Jury or Granting Motions to Dismiss or for Summary Judgment, Will Often "Write Out of Court" a Losing Party.* Reference has been made earlier to procedures at the Armed Services Board of Contract Appeals. As distinguished from the Federal courts of appeals, opinions are written in all cases. A major problem at the ASBCA, and for the United States Court of Claims in its review under 41 U.S.C. Secs. 321,322, is the content of ASBCA decisions.

In *Industrial Electronics Hardware Corp.*, 68-1 BCA Par. 6760, the main issue was whether a contract for radiac detection instruments (called dosimeters) was impossible of performance. The government relied upon manufacture of the dosimeters by three companies, A, B and C, as proving possibility of performance. In the ASBCA's lengthy decision in favor of the government, no mention is made that in order to accept a lot of 20 preproduction samples from company B, the government milled down the barrels of over ten of the units in order to accept them. This fact was also not mentioned in the Trial Commissioner's Report to the Court of Claims recommending affirmance of the board's decision. 16 CCF Par. 81,041[8].

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8. The case was settled after the Commissioner's Report. Accordingly, there will be no further action on it be the Court of Claims. At the U.S. Court of Claims, the method of review of decisions of Bpards of Contract Appeals. is by motions for summary judgment. After briefs were submitted to the Commissioner of the Court of Claims, Industrial requested oral argument before the Commissioner and the government joined in the request. The Commissioner's decision was rendered at a time when both parties thought the next step in the litigation was to receive notice of a date for oral argument.

The Connecticut Practice Book sets forth standards for the writing of reports by court-appointed referees that, in summary, say such a report should:

a) State the claims of the parties.

b) Make findings of ultimate facts.

c) Where ultimate facts will be questioned, also make findings of subordinate facts.

d) on request, make findings of undisputed facts.

e) Make findings of fact sufficient to allow a court on judicial review, to consider the legal theories of the parties.

f) Not find facts in such doubtful language that their real meaning does not appear.

Connecticut Practice Book Sections 354, 358, 359, 360, 363.

To the extent that judges are not required to render opinions, their decisions are the same as verdicts of juries and thus defy appellate review.

6. *A Litigant Is Not Entitled to His Day In Court.* The best proof of this is the failure of courts to follow *Dredge Corp. v. Penny, supra.* In December, 1972, counsel for petitioners had lunch in New York with Mayor Joseph L. Alioto of San Francisco, a prominent lawyer specializing in antitrust cases before becoming mayor. During their conversation, Mayor Alioto said, "The hardest thing in the law today is to obtain a hearing."

6. In *S. Wallach Co. v. IBM*, plaintiff was in a unique relationship with IBM and was put out of business because of the relationship. The facts not only fit the tort of slander but also fit the torts of interference in contract relations (between Wallach and the Crow Company) and *prima facie* tort. The lower court judge never discussed the issue of express malice, which was fully put in issue by Wallach. Accordingly, pretrial termination of the litigation was improper and the New York courts, on the merits of the *S. Wallach v. IBM* case, should be ordered to reinstate the case at the trial level.

In *Hayne v. Boeing*, despite persistent and thorough efforts, plaintiff was denied the identity of detectives only available from Boeing unless one is to assume a litigant is obligated to depose the detectives whose names appear in the six pages of the Chicago "Yellow Pages" devoted to them. Mr. Hayne suffered a *quasi*-summary judgment as soon as he was deied access to the identity of Boeing's detectives.

In *Topi k v. Catalyst*, the public stockholders had the benefit of an agreement, supported by ample consideration, permitting them to litigate the value of their shares of freely tradeable stock of EA-Maryland as those shares existed at the time of the merger into EA-Delaware. On a trial on the merits, they clearly have the right to a substantial recovery against Catalyst.

CONCLUSION

For The Foregoing Reasons, The Petition For Certiorari, And The Two Companion Petitions, Should Be Granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 16 1973
MICHAEL RODAK, JR., CLE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-127

Rolf Topik, Henry Moskowitz, Stanley Schwartz, Mary Johnson, Richard and Christina Smith, individually and in behalf of all other Holders of Freely Tradeable Common Stock of Electronic Aids, Inc., a Maryland Corporation,

Petitioners,

v.

Catalyst Research Corporation, Mine Safety Appliances Company, Milton G. Hulme, Jr., George H. Deike, Jr., John W. Carville, Eugene W. Merry, John T. Ryan, Jr. and Electroni ic Aids, Inc., a Maryland Corporation.

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Docket No. 72-1846)

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UNITED STATES CONSTITUTION
FIFTH AND FOURTEENTH AMENDMENTS

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26, Federal Rules of Civil Procedure

Rule 26.

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral exam-

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 56, Federal Rules of Civil Procedure

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered

on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the

satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Rule 59, Federal Rules of Civil Procedure

Rule 59.

NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

NEW YORK CIVIL PRACTICE LAW AND RULES

CIVIL PRACTICE LAW AND RULES

LAWS 1962, CHAPTER 308

Effective September 1, 1963

As amended to the close of the Regular Session of the 1969 Legislature.

An Act in relation to civil practice and prescribing rules of civil procedure governing generally the civil procedure in the courts of the state of New York and before the judges thereof, constituting chapter eight of the consolidated laws

ARTICLE 32—ACCELERATED JUDGMENT

3201. Confession of judgment before default on certain installment contracts invalid.
3211. Motion to dismiss.
(a) Motion to dismiss cause of action.
(b) Motion to dismiss defense.
(c) Evidence permitted; immediate trial; motion treated as one for summary judgment.

(d) Facts unavailable to opposing party.
(e) Number, time and waiver of objections; motion to plead over.
(f) Extension of time to plead.
3212. Motion for summary judgment.
(a) Time; kind of action.
(b) Supporting proof; grounds; relief to either party.
(c) Triable issue of fact as to damages.
(d) Matrimonial actions.
(e) Partial summary judgment; severance.
(f) Facts unavailable to opposing party.
(g) Limitation of issues of fact for trial.

Rule 3211. Motion to dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. The court may order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading. Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered

on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

L.1962, c. 308; amended Jud.Conf.1964 Proposal No. 6; Jud. Conf.1965 Proposal Nos. 5, 6; L.1965, c. 773, § 9, eff. Sept. 1, 1965.

Rule 3212. Motion for summary judgment

(a) Time; kind of action. Except as provided in subdivision (d) with respect to a matrimonial action, any party may move for summary judgment in any action, after issue has been joined.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Triable issue of fact as to damages. The existence of a triable issue of fact as to the amount or the extent of the damages shall not bar the granting of summary judgment. If only such a triable issue of fact is presented the court shall order an immediate hearing before a referee, before the court, or before the

court and a jury, whichever may be proper, to assess the amount or the extent of the damages. Upon the rendering of the assessment, the court shall direct the entry forthwith of the appropriate summary judgment.

(d) Matrimonial actions. In a matrimonial action, a motion for summary judgment may be made only on the basis of documentary evidence or official records which establish a defense to the cause of action. The motion shall be granted if upon such evidence or records, the defense shall be established sufficiently to warrant the court as a matter of law in directing judgment.

(e) Partial summary judgment; severance. Except as provided in subdivision (d) with respect to a matrimonial action, in any action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

L.1962, c. 308; amended L.1963, c. 533, § 1; L.1965, c. 773, § 10, eff. Sept. 1, 1965.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 72-1846

Rolf Topik, Henry Moskowitz, Stanley Schwartz, Mary Johnson, Richard and Christina Smith, individually and in behalf of all other Holders of Freely Tradeable Common Stock of the Electronic Aids, Inc., a Maryland Corporation,

Appellants,

-versus-

Catalyst Research Corporation, Mine Safety Appliances Company, Milton G. Hulme, Jr., George H. Deike, Jr., John W. Carville, Eugene W. Merry, John T. Ryan, Jr., and Electronic Aids, Inc., a Maryland Corporation,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Argued January 11, 1973 Decided February 6, 1973

Before WINTER, CRAVEN and FIELD, Circuit Judges

James V. Joy, Jr., for appellants; Edmund K. Trent (Reed, Smith, Shaw and McClay; Lewis A. Noonberg; Paul V. Niemeyer and Piper and Marbury on brief) for Appellees.

PER CURIAM:

Upon consideration of the briefs and oral arguments, we find no reversible error.

AFFIRMED.

Same Caption

ORDER

The petition for rehearing of Rolf Topik, et al. having bee been read and considered, and no judge having requested a poll poll on the suggestion for rehearing in banc; it is, with the concurrence of Judge Craven and Judge Field,

ORDERED, that said petition be, and it is hereby, denied.

For the Court:

Harrison C. Winter

United States Circuit Judge

FILED
Mar 16 1973
William K. Slate, II
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROLF TOPIK, et al	)	
	)	
	)	
vs.	)	No. 70-1228-M Civil
	)	
	)	
CATALYST RESEARCH CORPORATION, et al	)	
	)	

Baltimore, Maryland
March 23, 1972

The above entitled case came on for hearing on montions (sic.) for summary judgment before His Honor James R. Miller, Jr. at 4:45 p.m.

APPEARANCES

For the Plaintiffs:

James V. Joy, Jr.

For the Defendants:

Edmund K. Trent

ORAL OPINION

THE COURT: The Court has considered the motions for summary judgment which have been filed in this case, Civil No. 70-1228, and is prepared to rule on the same by oral opinion at this time. The Court reserves the right to edit its opinion for grammatical errors and to insert legal authority for propositions stated and to supplement the opinion in written form in the event of an appeal or for any other reason which appears appropriate to the Court.

This is an action in two counts. The preliminary facts have been stated to some extent in an opinion of this Court previously entered on March 22nd, 1972, and will not be restated.

Count One is an attempt by the Plaintiffs, minority stockholders in Electronic Aids of Maryland, to obtain a valuation of the stock which they held in said corporation vis-a-vis the valuation of the stock held by Catalyst Research Corporation in Electronic Aids of Maryland which changed from that valuation which was set forth in a merger agreement under which Electronic Aids of Maryland was merged with a subsidiary of American Standard, Inc., a Delaware Corporation.

The Plaintiffs' counsel concedes that Article 23, Section 73 of the Annotated Code of Maryland (1966 Replacement Volume) is applicable to the questions presented by Count One; but, Plaintiffs contend that an agreement dated September 4, 1970 between Rolf Topik and Catalyst Research Corporation, designated as Exhibit T-8 in a certain stipulation of exhibits filed in this proceeding, constitutes a waiver by the parties of any requirement that their rights must be determined solely by the provisions of said section of the Maryland Code or, in the alternative, that said agreement constitutes or creates an alternative method of resolving their dispute as to the valuation of their respective blocks of stock in Electronic Aids of Maryland.

The Plaintiff contends that said exhibit T-8 is ambiguous and that parol evidence is admissible to supplement

and explain the meaning of said agreement.

On a motion for summary judgment it is the Court's function to determine whether or not, under the pleadings, depositions, admissions, stipulations and affidavits then on file in the proceeding, facts are presented which would be admissible at a trial of the case which are material to the determination of the legal issues involved and which demonstrate a dispute of fact on material questions.

No evidence has been presented to which this Court's attention has been directed by the Plaintiffs in Count One of any facts tending to show any fraud in the inducement of Exhibit T-8, any conditions precedent to Exhibit T-8 not stated therein, or, in fact, that Exhibit T-8 means anything other than what it specifically says.

It is argued that Exhibit T-8 was a meaningless agreement and that, therefore, Exhibit T-8 must create an alternate remedy to Section 73 or Article 23 of the Maryland Code or that it must, at least, be a waiver of the Maryland Code remedy.

In the Court's view, this argument does not logically follow and there is no evidence to which this Court's attention has been directed in support thereof.

The facts would indicate that the agreement was entered into at the courthouse door at a time when the Plaintiffs threatened the institution of a suit requesting an injunction against the merger contemplated between Electronic Aids of Maryland and a subsidiary of ASI, American Standard.

The evidence further indicates that the dispute was not concerning the consideration being paid by ASI for the stock of Electronic Aids of Maryland, but rather, the distribution of that consideration between the Plaintiff and those minority stockholders similarly situated with him on the one hand and Catalyst Research Corporation on the other hand. The agreement, Exhibit T-8 does not, in terms, waive any of the requirements of Article 23, Section 73 supra, but does require that Catalyst, the majority stockholder, and obviously in a position, under the facts to vote

approval of the merger, hold" . . .intact (of) four thousand of the Catalyst shares to secure any rights against Catalyst which may be asserted by . . .the public stockholders . . .to obtain a portion of such shares issuable to Catalyst" for a period of thirty days following the effective date of the merger.

The agreement further provided that Catalyst would not sell, pledge or hypothecate such shares without giving Topik at least one week prior written notice of its intention so to do. There does not appear any ambiguity in this agreement. On its face it would seem to be an attempt to require Catalyst to maintain four thousand shares of the stock which Catalyst would obtain by the merger as security for the possibility that the public stockholders, of which Mr. Topik was one, would either reach an agreement with Catalyst of compromise under which Catalyst would convey more of its newly acquired shares than contemplated at that time to Topik, et al, or it would be security for the payment of the fair value of the Topik, et al stock as determined under the provisions of Article 23, Section 73.

Article 23, Section 73 specifically provides in part, "Any stockholder who fails to comply with the requirements of this Section within the time specified shall be bound by the terms of the consolidation, merger or transfer." There is no evidence that the terms of the merger have not been complied with relating to valuation. There was no evidence that the Plaintiffs have complied with nor attempted to comply with the provisions of Article 23, Section 73 aforesaid.

There is no dispute of material fact, therefore, relating thereto.

Summary judgment for the Defendants is granted as to Count One.

Count Two alleges a breach of fiduciary duties on the part of individaul defendants who were directors of Electronic Aids of Maryland and held other positions recited in more detail in the March 22nd opinion of this Court.

It also alleges a breach of duty to Mr. Topik and those similarly situated with him on the part of Catalyst and its

parent corporation, Mine Safety Appliances, Inc.

Plaintiffs point to three areas as evidence of the breach of said duties. First, the Plaintiffs assert as support for their position, Stipulation Exhibit No. 22, the original option agreement under which Mine Safety Appliance Company obtained an option for the acquisition of shares of Electronic Aids of Maryland. It was under this agreement that Catalyst ultimately acquired seventy per cent of the stock of Electronic Aids of Maryland. It is apparent that the option agreement, a twenty-nine page document with exhibits attached thereto, attempted to cover all of the complex and intricate steps and duties required on the part of all concerned to accomplish the intent of the agreement.

The Plaintiffs contend that the parent company and Catalyst had an affirmative obligation under the provisions of paragraph two of said agreement to provide interest-free working capital to Electronic Aids of Maryland. It is further stated that paragraph six of the affidavit of Morris Tischler, one of the signatories of said option agreement, which affidavit is dated March 6, 1972, is, assuming it is otherwise admissible, evidence of the intent of the agreement aforesaid.

In the Court's view, paragraph two of the agreement in no way intimates, indicates or even allows the inference that the buyer, Mine Safety Appliances Company, was required thereby to provide interest-free working capital to Electronic Aids of Maryland, either in the form of interest-free loans, equity, financing, or in any other form.

The Tischler affidavit aforesaid, does not state that the parties negotiating stipulation Exhibit No. 22 on the part of Mine Safety promised as a condition precedent to said agreement or as a part thereof that Mine Safety would provide interest-free working capital. Paragraph six of the Tischler affidavit says nothing more than Mine Safety stated it would provide working capital, but did not state the form in which said working capital would be provided. As a matter of fact, the Tischler affidavit expressly states that said affidavit should should not be construed to mean that Tischler was saying that Mine Safety expressly promised to make interest-bearing contributions to capital.

There is no evidentiary basis, therefore, to which the Court's attention has been directed that shows that the admitted borrowing by Electronic Aids of Maryland, which was authorized by the individual defendant directors of Electronic Aids of Maryland and acquiesced in by the corporate defendants was in any way a violation of Stipulation Exhibit 22. Neither is there any evidentiary basis to this which the Court's attention has been directed for a factual conclusion that the terms upon which the working capital was provided to Electronic Aids of Maryland was on terms grossly disparate with those generally existing in the marketplace at the applicable and appropriate times for the borrowing of money. As a matter of fact, the evidence indicates that conventional sources of financing were not available to Electronic Aids of Maryland at that time.

There is no evidentiary support to which this Court's attention has been directed for any conclusion that the directors in this regard did not, at least, exercise reasonable business judgment in determining to borrow money on an interest-bearing basis from Catalyst and on the terms upon which said sums were ultimately borrowed.

While it has been argued that the circumstance that the majority stockholder in the corporation was providing working capital in the form of interest-bearing loans is some way improper, no factual support has been produced for a conclusion that the financing scheme was intended to defraud or dilute the interest of the minority stockholders or that, in fact, said scheme did defraud them or dilute their interest.

This is not an Internal Revenue case and whether or not the Internal Revenue Service, under its code, would allow interest deductions under these circumstances is not a matter before the Court. Even assuming, however, that the Internal Revenue would not allow interest deductions under these circumstances to the corporation, a position which this Court believes unlikely, said determination would not be necessarily determinative in a suit alleging a breach of a fiduciary duty.

In the view the Court takes of the matter, it is not

necessary to comment upon or rule upon the Defendants' positions in Count Two relating to whether or not a derivative action would lie under the circumstances here in view of the fact that Electronic Aids of Maryland, Inc. no longer exists or upon their contention that the Plaintiffs were required, before bringing this suit, to request relief from the Board of Directors of one or more of the Defendant corporations.

The motion for summary judgment in favor of the Defendants will be granted as to Count Two.

All right, gentlemen, is there anything further?

MR. TRENT: No, Your Honor.

MR. JOY: No, Your Honor.

THE COURT: Court will stand in recess.

I hereby certify that the foregoing is a true and accurate transcript of the Court's Oral Opinion in the aforementioned case.

Fred Sapperstein
Official Reporter

CAPTION

AMENDED COMPLAINT

Plaintiff by NOLAN, PLUMHOFF and WILLIAMS their attorneys, as and for their Compalint, herein allege as follows:

MATTERS COMMON TO BOTH CLAIMS

1. Plaintiff Rolf Topik is a resident of the State of Connecticut and is the holder of 2,000 freely tradeable shares of common stock of Electronic Aids Inc., a Maryland corporation ("EA Maryland"), evidenced by certificates numbered CU 1986-2005 and is also the holder of the following numbers of freely tradeable shares of common stock of "EA Maryland" as custodian for the following minors:

Minor	*Number of Shares*	*Certificate No.*
Roy Topik	450	CU 2959
Robert Topik	450	CU 2960

2. Plaintiff Dr. Henry Moskowitz is a resident of the State of Connecticut and is the holder of 5,460 freely tradeable shares of common stock of "EA Maryland."

3. Plaintiff Stanley Schwartz is a resident of the State of New York and is the holder of 2,200 of freely tradeable shares of common stock of "EA Maryland."

4. Plaintiff Mrs. Mary Johnson is a resident of the State of New York and is the holder of 500 freely tradeable shares of common stock of "EA Maryland."

5. Plaintiffs Richard and Christina Smith are residents of the State of Connecticut and are joint owners of 400 freely tradeable shares of common stock of "EA Maryland."

6. Defendant Catalyst Research Corporation ("Catalyst") is a Maryland corporation whose principal office is located in Baltimore, Maryland, and at all times hereinafter

mentioned defendant "Catalyst" was the holder under an investment letter of 70% of the common stock of "EA Maryland."

7. Defendant Mine Safety Appliances Inc. ("MSA") is on information and belief a Pennsylvania corporation whose principal offices are located in the State of Pennsylvania and at all times hereinafter mentioned was and is the owner of substantially all of the common stock of "Catalyst."

8. Defendants Milton G. Hulme, Jr.; George H. Deike, Jr.; John W. Carville; Eugene W. Merry and John T. Ryan, Jr. are on information and belief residents of the State of

9. Defendant Electronic Aids Inc. is a corporation organized and existing pursuant to the laws of the State of Maryland with principal offices in Pittsburgh, Pennsylvania.

FIRST CLAIM

NATURE OF CLAIM AND JURISDICTION OF COURT

10. This claim is asserted in behalf of plaintiffs and of all the holders of freely tradeable common stock of "EA Maryland" to secure for them a fair allocation of the purchase price paid by American Standard Inc. ("ASI") pursuant to a merger agreement (Exhibit A) between "EA Maryland" and Electronic Aids Inc., a Delaware corporation ("EA Delaware") which was and is wholly owned subsidiary of "ASI."

11. Jurisdiction of this claim is based on diversity of citizenship, 28 USC 1332. The matter in controversy, exclusive of interests and costs, exceeds the sum of $10,000.00

Subject Matter of Claim

12. Defendant "EA Maryland" issued a press release on August 3, 1970 announcing an agreement of merger with "ASI."

13. On information and belief immediately prior to announcement of said merger agreement, "EA Maryland's" common stock was trading in the Over the Counter Market at $1.50 Bid and $1.75 Asked per share.

14. On May 26, 1961 "EA Maryland" had offered to sell, and subsequently sold 100,000 shares of its Common Stock to the public pursuant to a Regulation A exemption from the Securities Act of 1933.

15. In or about 1965, "MSA" had purchased for "Catalyst" 722,790 shares of Common Stock of "EA Maryland," representing 70% of such outstanding shares pursuant to an investment letter.

16. On information and belief, as of August 29,1970 there were 500 holders of common stock of "EA Maryland."

17. On August 31, 1970 stockholders of "EA Maryland" began receiving in the mail a proxy statement from their company announcing a meeting on September 10, 1970 to vote on the aforesaid merger (three days after the Labor Day Holiday) that had not been submitted to the United States Securities and Exchange Commission. Said proxy statement was materially misleading under Rule 10(b) 5, Securities Act of 1934 and in violation of the provision of Rule 14(a) of the Securities Act of 1934, in that it failed to advise the holders of the publicly traded stock of "EA Maryland" that pursuant to the terms of said merger, the public share holders of "EA Maryland" would sustain a loss of approximately $260,000.00 while "Catalyst" would gain approximately $17,000.00

18. On September 4, 1970 a hearing was held before Hon. Edward S. Northrup, Judge of the United States District Court for the District of Maryland on an application by plaintiff Rolf Topik for a temporary Restraining Order barring the merger which hearing was attended by attorneys for plaintiff, "ASI" and Defendants "EA Maryland," "Catalyst" and "MSA."

19. At said conference, counsel for Plaintiff Rolf Topik *inter alia* argued that the merger should be restrained because of the undue shortness of the time of notice of the meeting since many stockholders would be on vacation during the last week of the summer and the intervention of the Labor Day Holiday.

20. In a meeting that followed, counsel for "EA Maryland" pleaded that the merger be consummated and that the dispute as to allocation of the proceeds of the merger between "Catalyst" and the "EA Maryland's" Public Shareholders be deferred until after the merger and he also threatened that plaintiff would be personally liable if the merger was not consummated.

21. Accordingly plaintiff and defendant "Catalyst" agreed that "Catalyst" would set aside 4,000 shares of "ASI" stock for possible payment to public shareholders of "EA Maryland," out of the 22,222 shares to be received by "Catalyst," the said possible payment to be in addition to the 1,000 shares of "ASI" to be received by such public shareholders. (Exhibit B)

22. Further, it was agreed that the final payment to the "EA Maryland" public shareholders over and above the said 1,000 shares would be based on a determination of the fair value of their shares as of the date of the Agreement of Merger by negotiation or by decree of a Court of competent jurisdiction and would be a reallocation among the the public shareholders and "Catalyst" of the aggregate of 23,222 shares to be received by the public shareholders and "Catalyst."

23. Plaintiff Rolf Topik in behalf of the public shareholders has negotiated with defendant "Catalyst" and the parties have been unable to agree as to the fair value of the shares of common stock of the "EA Maryland" public shareholders.

24. The fair value of each freely tradeable share of "EA Maryland" as of the date of the agreement of merger of "EA Maryland" into "EA Delaware" was .0405 shares of "ASI."

SECOND CLAIM

* * * * * * *

AGREEMENT

AGREEMENT dated September 4, 1970 between Rolf Topik ("Topik") of Stamford, Connecticut and Catalyst Research Corporation ("Catalyst").

Catalyst owns 70% of the issued and outstanding Common Stock of Electronic Aids, Inc. and has advanced monies to Electronic Aids, Inc. ("EA"). EA has sent to its stockholders, including Topik, a notice of meeting and other materials dated August 29, 1970 pertaining to two special meetings of stockholders to be held on Thursday, September 10, 1970, to act on various matters including a merger of EA with and into a wholly owned subsidiary ("AS Sub") of American Standard, Inc. ("AS"), purusant to an agreement dated August 7, 1970 between AS and EA.

Topik has threatened to file a suit in the United States District Court for the District of Maryland which would seek a restraining order against the consummation of the merger to be acted on at the September 10 meeting and has stated that the total number of shares of AS Common Stock to be issued in the trhasaction in exchange for Common Stock and indebtedness of EA are adequate but that the primary ground of such an action is that the allocation of such shares between the indebtedness owned by Catalyst (or the preferred stock of EA it has agreed to take in exchange therefor) and the Common Stock is subject to dispute and is not fair.

Topik has no assertion against AS, but only against Catalyst (or its affiliates).

Catalyst denies any unfairness and asserts that both total consideration, as well as the allocation of consideration between the Common Stock and indebtedness owned by Catalyst, is more than fair to the owners of Common Stock of EA.

However, in order to avoid the threatened litigation, and to permit the merger itself to be consummated, which is considered desirable by both parties hereto, it is agreed as follows:

1. Topik will refrain from filing the suit threatened

to be filed in the United States District Court for the District of Maryland or any other litigation seeking to restrain the consummation of the merger, the holdings of the stockholders' meetings of EA on September 10, 1970 or any of the related actions described in the notice, either against AS, AS Sub, Catalyst or EA, or any one of them, and will not sue AS or AS Sub in connection with the transaction.

2. If the merger is consummated, and Catalyst receives the shares of AS Common Stock which it is to receive under the terms of such transaction, Catalyst agrees that it will not sell, pledge or hypothecate 4,000 of such shares for a period of thirty days following the effective date of the merger and thereafter without giving Topik at least one week's prior written notice of its intention to do so.

3. It is understood and agreed the neither Catalyst or Topik admits for any purpose the validity of any claim or assertion made by either of them and this agreement does not preclude the making of claims by Topik against Catalyst (by litigation or otherwise) with respect to the question of allocation of the shares of AS among the Catalyst debt and Common Stock ownership in EA and the other Common Stock ownership in EA, it being understood that Topik has requested the holding intact of 4,000 of the Catalyst shares to secure any rights against Catalyst which may be asserted by him and the public stockholders whose interest he claims to represent, to obtain a portion of such shares issuable to Catalyst.

IN WITNESS WHEREOF, this Agreement has benn executed and delivered on the date above written at Baltimore, Maryland by and on behalf of Topik and on behalf of Catalyst.

Witness:

Robert Reagan

Isaac Neuberger

Rolf Topik
Rolf Topik

James V. Joy, Jr.
Counsel for Topik

Catalyst Research Corporation

By *N. P. Scriggins*
Counsel

By *Lewis A. Noonberg*

CAPTION

ANSWER OF DEFENDANT CATALYST RESEARCH CORPORATION

First Defense

1. The complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Defendant Catalyst admits the averments of fact contained in paragraphs 6, 11, 12 and 26 of the complaint, and admits the execution and delivery of the agreements attached as Exhibits A and B.

3. Defendant Catalyst is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments contained in paragraphs 1-5, 10, 16 and 25.

4. Defendant Catalyst denies that defendant Electronic Aids, Inc. is a corporation organized and existing pursuant to the laws of the State of Maryland with principal offices in Pittsburgh, Pennsylvania, as alleged in paragraph 9 of the Compalint, and on the contrary avers that said corporation ceased to exist on September 10, 1970, on which date it was merged into Electronic Aids, Inc., a corporation organized and existing under the laws of the State of Delaware, the surviving corporation.

5. Defendant Catalyst denies each and every other averment of fact contained in the complaint, except that defendant Catalyst admits that it has 902,790 shares of common stock outstanding of which 832,200 shares are owned by Mine Safety Appliances Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

Third Defense

6. Plaintiffs' exclusive remedy under their first claim

is that specified in article 23, section 73 of the annotated code of Maryland.

Fourth Defense

7. To the second claim defendant Catalyst pleads the statute of limitations.

Edmund K. Trent

Reed,Smith,Shaw & McClay

Lewis A. Noonberg

Piper & Marbury

Attorneys for defendant
Catalyst Research Corporation

CAPTION

MOTION UNDER RULE 59 FRCP THAT JUDGMENT AGAINST PLAINTIFFS BE VACATED AND A TRIAL ORDERED

Plaintiffs move that Summary Judgment entered against them be vacated on the following grounds:

1) The agreement dated September 4, 1970 conferred on them the dual right to seek appraiserhip [sic.] of their stock under Article 23, Sec. 73 of the Annotated Code of Maryland or, in the alternative, to apply to a court of competent jurisdiction for valuation of their stock and the stock of the other stockholders similarly situated.

2) In the meetings in the courthouse on September 4, 1970, it was agreed that the parties would negotiate in good faith to fix a fair allocation of the proceeds of the merger of Electronic Aids, Inc., a Maryland corporation ("EA Maryland") into Electronics Aids, a Delaware corporation ("EA Delaware" or "AS Sub"). Counsel for Plaintiffs met with Mr. Trent, Counsel for Defendants, on the first day Mr. Trent had available, September 15, after the merger but was not sent Defendants' response to the offer of settlement until September 28 two days before the date to exercise appraisal rights causing Plaintiffs' attorney to receive the letter only the day before.

3) Defendants failed to deny Paragraph 22 of the Original and Amended Verified Complaint except for a catch-all denial that purported to deny a number of statements of fact that were clearly undeniable (e.g., that a meeting took place before Judge Northrup, Sec. 18, Mine Safety Appliance's offices are in Pennsylvania, Sec. 7, that Mine Safety purchased 722,790 shares of EA-Maryland in or about 1965, Sec. 13, negotiations between parties and failure to agree as to fair value of EA-Maryland stock held by stockholders, Sec. 23, Catalyst's advances to EA-Maryland of $850,000, Sec. 28.

4) Defendants failed to call as witnesses their attorneys present at the September 4 meetings because they presumably would admit that an agreement to confer dual rights on Plaintiffs and the other Shareholders.

5) Defendants restricted their discovery of Plaintiff Topik to what happened *before* Judge Northrup and rested their discovery on the fact of existence of the dual rights.

6) In their Motion for Protective Order and in the oral argument against Defendant's Motion under Rule 37, FRCP, plaintiffs requested and were denied the service of simultaneous common Interrogatories on all the attendees at the September 4 meetings.

7) At the time of oral argument on the Second Motion to Quash Service on the Individual Defendants, counsel for plaintiffs asked the Court whether testimony would be permitted at the time of the hearing on Defendant's Motion for Summary Judgment, and was instructed that no testimony could be offered, which counsel understood to include the persons present at the September 4 meetings.

8) Mr. Topik was seeking an injunction on September 4, 1970 because he was the Underwriter who had caused there to be public stockholders of EA-Maryland. If he had sought appraisal rights, he would have removed himself from a position to seek the rights of the public stockholders. He would have elected his remedy and departed from their class.

CHRONOLOGY OF EVENTS

The following calendars for August and September 1970 are helpful in in understanding the critical time sequence of events in those months:

August 1970

Sun	*Mon*	*Tues*	*Weds*	*Thurs*	*Fri*	*Sat*
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

September 1970

		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

The significant dates are:

August 5: announcement by Catalyst Research Corp. of agreement to merge EA Maryland into EA Delaware, a subsidiary to be formed of American Standard Industries.

August 29: Mailing by Catalyst of Notice of Special Meeting of Stockholders to meet in Baltimore on September 10 to: convert $850,000 of so-called debt into preferred stock for issuance to Catalyst and 2)merger of EA Maryland into EA Delaware by exhange of EA Maryland stock, common and new preferred, for American Standard ("ASIT") stock.

August 30-September 5: last weekend of summer when more Americans are on vacation than any other week of year.

August 31: receipt by stockholders from the mail of Notice of Stockholders Meeting or as many as were not on vaction.

September 3: telephone conversations by Mr. Joy to Mr. Trent relative to extension of date of Special Meeting of Stockholders and extension of date of hearing on Temporary Restraining Order. Agreement by him to extension subject to approval by Mine Safety. Disapproval by Mine Safety because delay might cause American Standard to withdraw from the transaction. Telephone conversation by Issac Neuberger, Baltimore counsel for plaintiff Rolf Topik, with Louis Noonberg, Baltimore counsel for Catalyst. Statement by Mr. Noonberg that he would stop injunction against merger by having Court set bond in an amount unobtainable by Plaintiff.

September 4: Hearing before Judge Northrup.

September 7: Labor Day (Return in the evening from vacation of many EA Maryland Stockholders).

September 10: Stockholders meeting approving merger.

September 15: Travel to Pittsburgh by Mr. Joy to present offer of settlement by Plaintiffs to Mr. Trent pursuant to understanding at September 4 meetings

September 25: Date of letter from Mr. Trent declining Plaintiffs' offer of settlement.

September 29: Receipt in the mail of Mr. Trent's September 25 letter.

September 30: Last day to file for appraisal rights under Maryland statute.

September 4 Meeting

The answers to the Interrogatories of Catalyst Research Corporation *only* pertained to the subject of the Interrogatory 16 – what occured *before* Judge Northrup:

> 16. What was the title and civil action number of the case described in paragraph 18 of the Complaint, what parties to said case were present at the alleged hearing on September 4, 1970, what is the name and address of legal counsel for each party named in said case, which of said counsel were present on September 4, 1970 at said alleged hearing, in what order did each

person speak, and what did each person say on each occasion when he spoke?

The questions to Mr. Topik on his oral deposition only pertained to the Interrogatory 16 (Topik Tr. 55-58) as did the questions to Mr. Joy (Joy Tr. 4-6).

In Catalyst's interrogatories and questioning of Mr. Joy and Mr. Topik all that was established was that plaintiffs by the agreement of that day had not surrendered their right to seek appraisal under the Maryland statute.

Defendant's ambivalance in Pleadings on this issue should be borne in mind. They pleaded the bar of the statute as an affirmative defense on which they would have the burden of proof. The claimed right to sue for allocation of a greater portion of the proceeds of the merger was specifically alleged in paragraph 22 of the Complaint and not specifically denied but at best lumped in a careless sweeping denial of clearly true and later to be admitted matters.

Defendant's discovery did not establish that dual rights to elect a forum for valuation had not been secured to Plaintiff Topik in behalf of the public stockholder class.

Certainly what happened is clear. Counsel for American Standard and local counsel for Catalyst persuaded Plaintiff Topik not to object to the merger by having him admit that the gross consideration being paid by American Standard was realistic and should not be disturbed.

They spoke about his right to sue for a fair allocation of the proceeds after the merger and recognized that he was not proceeding for himself but for a whole class.

The agreement reflects this:

> . . . the allocation of such shares between the indebtedness owned by Catalyst (or the preferred stock of EA it has agreed to take in exchange therefor) and the Common Stock is subject to dispute and is not fair.
>
> Topik has no assertion against AS, but only against Catalyst (or its affiliates).

* * * * *

1. Topik * * * will not sue AS or AS Sub in connection with the transaction.

* * * * *

3. * * * this agreement does not preclude the making of claims by Topik against Catalyst (in litigation or otherwise) with respect to the *question of* allocation of shares of AS among the Catalyst debi and Common Stock ownership in EA * * * to obtain a portion of such shares issuable to Catalyst.

After the merger, stockholders of EA Maryland, including Mr. Topik, received letter from AS advising them of their rights of appraisal and thus making it clear that seeking of appraisal would be a species of suit againstxx AS.

The verified Complaint and Amended Complaint alleges:

> 22. Further, it was agreed that the final payment to the "EA Maryland" public shareholders over and above the said 1,000 shares would be based on a determination of the fair value of their shares as of the date of the Agreement of Merger by negotiation or by decree of a Court of competent jurisdiction and would be a reallocation among the public shareholders and "Catalyst" of the aggregate of 23,222 shares to be received by the public shareholders and Catalyst.

Plaintiffs submit that it was incumbent upon Defendants to submit a written sworn statement of their attorneys present at the meeting denying this paragraph or suffer existence of a triable issue of fact.

Plaintiffs are shocked that they responded to the urging of Judge Northrup to work out an agreement that would obviate a necessity for an injunction and find that Judge Northrup's Court will not cooperate in taking jurisdiction of the case. All this occured in the presence of a layman, who is left with a low regard for the law and not to receive his day in Court. Plaintiffs are more shocked that

the principals of their former corporation would seek to trick them at every turn as now stands successfully accomplished. The short notice of meeting . . . the negotiations that were really not negotiations . . . the hours of discovery that had nothing to do with the issue of the September 4 agreement . . . the moving papers on the Motion for Summary Judgment seeming to be perfunctory on the issue of the agreement.

There has always been the lack of differentiation by Defendants between the question of whether the Appraisal Statute is like a Statute of Limitations that can never be waived and the question of whether in this case it was waived.

Showing Plaintiffs believed they had dual rights, Defendants rested. Their appeal really was to the convenience of the Court and an implied indication of the benefits of bypassing difficult litigation.

Plaintiffs request that decision on this motion be deferred until they have received the Court's opinion, as corrected after dictation in Court and receive the opportunity to cite law and make written argument specifically directed to the opinion.

As Counsel for Plaintiffs recalls the oral argument and the opinion as dictated,the principal burden was placed on him to point out fragments of the record militating against the Summary Judgment. The problem is that dissection and isolation of facts almost always makes them seem innocent. Enough isolation and fragmentation will make all facts seem innocent.

Here the September 4 agreement allowed litigation or provided a disputed question of fact of interpretation and what occured in the surrounding conversations and circumstances. The firm conviction of Mr. Topik and Mr. Joy that litigation was possible apart from the appraisal statute was enough to create an issue of fact for a threshold trial.

In this case, the hearing on the Motion for Summary Judgment became an unsuspected trial on an unsuspected genuine issue with Plaintiffs being denied witnesses. All

this means that at any time a Defendant can blow the whistle and Plaintiff has to be sure that a Defendant can blow the whistle and Plaintiff has to be sure that its whole case is on file with the Court. This can best be called Trial by Ambush, especailly when the Summary Judgment is scheduled after the time for the close of discovery. If Defendants were sincere about this issue, why was it not contested at the outset of the litigation?

Again it was a matter of Defendant's superb timing.

CONCLUSION

JUDGMENT IN FAVOR OF DEFENDANTS SHOULD BE VACATED AND A THRESHOLD TRIAL SHOULD BE HELD ON THE VALIDITY AND MEANING OF THE SEPTEMBER 4 AGREEMENT AND THE INDUCEMENTS FOR SAID AGREEMENT

Dated: Towson, Maryland
March 31, 1972

James V. Joy, Jr.
60 East 42nd Street
New Yorm, N.Y. 10017

NOLAN, PLUMHOFF and
WILLIAMS

By _____

A Member of the Firm
204 West Pennsylvania Ave.
Towson, Maryland 21204

COURT OF APPEALS CAPTION

ORDER

This is a motion by appellees to dismiss the appeal in this case as untimely filed. Appellants have filed a response to this motion. Included in this response is a motion for summary reversal of the district court's entry of summary judgment in favor of appellees on March 23, 1972.

The sole issue presented to this Court by appellees' motion is whether appellants' notice of appeal from the judgment of March 23, 1972, was timely filed, despite the fact that it was not filed until June 6, 1972. The answer to this question depends on the effect which is to be given a motion which appellants filed on April 3, 1972.

Appellants filed this motion as one under Rule 59 FRCP to vacate an order for a trial on the merits [sic]. This motion was timely filed under the 10 day requirement of Rule 59(b).

Rule 4(a) FRAP provides that "[]he running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court . . . " under Rule 59 FRCP, and that the full time for filing a notice of appeal will run from the district court's ruling on that motion.

In this case the district court ruled on appellants' motion on May 12, 1972; thus appellants would have had 30 days from that date to file a notice of appeal, and such notice filed on June 6 would have been timely.

The district court ruled, however, that a motion under Rule 59 was inappropriate "where a motion for summary judgment was granted and entered for the defendants." It then treated appellants' motion as one filed under Rule 60 (b)(6) for relief from a judgment or order for "any other reason justifying relief from the operation of the judgement,"

and dismissed it as being without merit.

Rule 60(b) specifically states that a motion filed pursuant to its provisions "does not affect the finality of a judgment or suspend its operation."

The question before this Court therefore becomes whether the district court was correct in its ruling that appellants' motion was inappropriate under Rule 59, and whether, if it were correct, that ruling would mean that appellants' motion would no longer terminate the running of time for filing a notice of appeal pursuant to Rule 4(a) FRAP.

Although the district court did not so specify, it can be presumed that it was treating appellants' motion as one for a new trial under Rule 59(a), which provides that "[a] new trial may be granted . . . in an action in which there has been a trial by jury . . . and in an action tried without a jury . . . "

Appellees' motion therefore raises the question of whether this language precludes application of Rule 59 to an action action which terminated in summary judgment without a trial. We find it unnecessary to decide this question, however, because of the Supreme Court's holding that the treatment of a "motion to vacate as one under Rule 59(e) was permissible . . ." *Foman v. Davis,* 371 U.S. 178, 181 (1962). Therefore, appellants' motion can be considered to have been appropriate under Rule 59(e) and to have terminated the running of the time for filing a notice of appeal.

Even if it were not appropriate, however, a motion filed in good faith under its provisions should terminate the running until it is held inappropriate by the district court. A contra rule would mean that a party could file a Rule 59 motion only at his peril. While the motion wss pending a notice of appeal would be premature, and then a motion filed after the motion was held inappropriate could be dismissed as untimely. The Supreme Court has said "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis, supra.*

We have also considered appellants' motion for summary

reversal of the district court's entry of summary judgment in favor of appellees. We find that this case presents substantial issues and that therefore the granting of summary reversal would be inappropriate.

For the reasons stated herein appellees' motion to dismiss and appellants' motion for summary reversal are denied and the case will be set for hearing.

Simon E. Sobeloff

United States Circuit Judge

United States Circuit Judge

United States Circuit Judge

FILED
Dec 15 1972
William K. Slate, II
Clerk

App. C1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued April 2, 1973

May 8, 1973

Before

Hon. TOM C. CLARK, Associate Justice*
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

DONALD F. HAYNE, Plaintiff-Appellant.) Appeal from the United States

No. 72-1261 vs.) District Court for

THE BOEING COMPANY, Defendant-Appellee.) the Northern District of Illinois, Eastern Division. NO. 70-C-2814 WILLIAM J. BAUER, Judge

ORDER

Plaintiff was employed by defendant (Boeing) from the fall of 1958 until August 7, 1959. During that period he participated in negotiations for the purpose of arranging for the purchase by Transocean Airlines of three aircraft from defendant, which Transocean intended to lease to Japan Airlines. The transaction was not consummated. After his discharge by defendant, plaintiff was employed by Transocean until the winter of 1960, when Transocean discontinued its operations. In Sep-

* Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States, Retired, sitting by designation.

tember of 1963 the Trustee in Bankruptcy of Transocean brought suit against Boeing, two airline companies, and Aviation Financial Services, Inc., alleging that a conspiracy among the defendants had frustrated Transocean's attempt to purchase three jet planes to be leased to Japan Air Lines. After a full trial in the Southern District of New York, Judge Pollack found that there was no merit to any of Transocean's claims.[1]

On November 12, 1970, plaintiff filed his complaint against Boeing in the court below. He alleged that he had cooperated with the Trustee in Bankruptcy in the New York litigation, that he was twice deposed by defendants in that case, and that they had employed private detectives to investigate him. His alleged injury was of two kinds: first, by making their surveillance known to him, the detectives "intimidated" plaintiff; and second, by transmitting derogatory

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[1] The last two paragraphs of his carefully reasoned opinion stated:

> "In sum, having seen and heard the witness, examined and considered the proofs and weighed the inferences and probabilities and resolved the issues of credibility, the factual conclusions which the Court reaches are the following, in addition to those already stated.
>
> "No contract for the sale of any of the jets was ever concluded between Boein and TAL. There is no evidence of any malice on the part of Boeing, Continental or Pan Am toward TAL or TCC. There was no conspiracy among Pan Am, Boeing and Continental, or any of them, to interfere with or deprive TAL of any opportunity of TAL to purchase jet aircraft or to obtain financing for the jet aircraft or to consummate a lease with JAL. No act or conduct by any of the defendants interfered with or deprived TAL of any opportunity of TAL to purchase jet aircraft or to obtain financing for the jet aircraft or to consummate a lease with JAL or anyone else." A. 157.

information to prospective employers defendant impaired plaintiff's employment opportunities. The complaint alleged a "First Claim" for treble damages under Sec. 4 of the Clayton Act, and a "Second Claim" in tort. The First Claim was dismissed on motion because no violation of the antitrust laws was alleged; the Second Claim was dismissed at the close of plaintiff's evidence because he had failed to prove a prima facie case.

Plaintiff appeals, making six arguments for reversal. Our reasons for rejecting them may be briefly stated.

1. Plaintiff argues that the First Claim should not have been dismissed because the "indirect damage" test (cff. *Billy Baxter Co.* v. *Cocal Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert.* denied 401 U.S. 923) was wrongly applied by the district court. However, as we read the Memoradum Opinion filed by Judge Marovitz on April 9, 1971, he did not even reach the "indirect damage" issue because he concluded that the complaint failed to allege any violation by Boeing of either Sec. 1 or Sec. 2 of the Sherman Act. He correctly pointed out that there was no allegation in the complaint that Boeing entered into an illegal agreement with any other firm (a claim that Boeing defamed the plaintiff is not tantamount to alleging an *agreement* with other firms) or that Boeing tried to monopolize ant relevant market.

The reference in the complaint to the actions brought by the Trustee in Bankruptcy against Boeing and other in Southern District of New York is not an allegation of an antitrust violation that caused the injuries of which plaintiff complains in this case. In this case plaintiff is complaining of conduct that took place *after* the Trustee's complaint was filed in September of 1963. Even if Judge Pollack had reached a different conclusion after analyzing the events of 1959 which gave rise to that litigation, such a different conclusion would not support plaintiff's attempt to rely on the antitrust laws in this case.

Judge Marovitz properly dismissed plaintiff's First Claim.

2. We find no error in the orders relating to pretrial

scovery or the district court's evidentiary rulings.

On May 18, 1971, Judge Marovitz ordered the parties to mplete discovery in 60 days. The case had been on file since ovember 12, 1970, and involved events that had occurred ars earlier. We find no abuse of discretion in the entry of is order and we are not persuaded that more time for dis- very would have affected the ultimate result.

Plaintiff's principal argument is that he was not given the ames of the "detectives" who made the investigation of him. efendant did tender their reports to the trial judge who char- tetized them as "routine credit reports." Since plaintiff made o request to have the reports made a part of the record on ppeal, we necessarily must accept the trial judge's character- ation as accurate. The failure to require production of such locuments was not, in our opinion, reversible error.

We find no merit in plaintiff's objection to the transfer f the case from Judge Marovitz to Judge Bauer or in his bjection to Judge Bauer's decision to accept previous rulings nade by Judge Marovitz. Nor did plaintiff have a right to have ave the district court certify his interlocutory order for appeal ppeal pursuant to 28 U.S.C. Sec. 1292(b). No such cerificate s proper unless the ultimate termination of the litigation would would be expedited; in this case it seems clear that piecemeal review would have had a dilatory effect.

Plaintiff's case rested largely on his own testimony. In three respects he complains of the judge's rulings on admis- sibility. First, the judge excluded evidence of certain anony- mous activities on the ground that there was no evidence to connect them with defendant. For example, once plaintiff answered his doorbell and found no one there; on another occasion two suspicious cars were seen outside his residence. Since there was no evidence that defendant authorized such activities and since plaintiff may well have been the subject of other investigations resulting from his marital and finan- cial difficulties, this evidence was properly excluded.

Second, during plaintiff's testimony about a job inter- view with a Mr. Gage at Lockheed, Burbank, the following

occurred:

"Q. Without first stating the words used, as he started the interview did he make reference to any [object]?

"MR. POUST: Objection to this. There is no member of Boeing present.

"MR. JOY: Your Honor, excuse me. I do not want to press too much, but I just want to ask. I have not asked for what was said.

"THE COURT: I know you did not." A. 83.

There is nothing in the record, either in the evidence or in the form of an offer of proof, to suggest that the object that Mr. Gage may have referred to was a "black list" document as plaintiff argues in his brief, or that it emanated from Boeing. The trial judge could properly conclude, on the basis of the record which plaintiff made, that the answer to that question was not material to the issues.

Finally, plaintiff complains of a ruling striking his testimony about a telephone conversation with one Robert G. Johnston, a Boeing official, in April of 1965. The call was made after plaintiff's first deposition in the New York case and before his second deposition. The pertinent questions and answers were:

"Q. What was said by you to him, and what did he say to you during that telephone conversation?

"A. The call was made to his home in the evening. Therefore, I asked him about his family.

"I also said, 'Bob, they are really putting the heat on.'

"His answer was, 'I know it and there is nothing I can do about.'

* * *

"Q. What further was said?

"A. Concerning the original quotation, the fact that 'they are bringing this heat on me because I have been a Transocean,witness,' and I explained what I meant by 'heat,' harassment, investigation, keeping me from getting jobs and things of that nature.

"That is when he replied, as I have stated, 'I know they are and there is nothing I can do about it.' " A. 92, 95, 96.

The court ordered the testimony stricken, apparently on the ground that there was no evidence that the word "they" referred to the defendant. Plaintiff then tried to prove that he was referring to Boeing when he used the word "they," but he he did not try to prove what the other party to the conversation understood that word to mean. Even if make the assumption that both partoes were referring to Boeing's lawyers, or to some other representatives of Boeing, the quoted comment,"I know it and there is nothing I can do about it" would still be hearsay.[2] There is no evidence that Johnston had any authority to act on behalf of Boeing with respect to the matters described by plaintiff; indeed, the quoted comment itself disclaims such authority. The telephone call was personal rather than in the course of either party's business. Considered in the context of the entire record, we believe it had so little probative force that the judge could properly insist that Johnston be called as aawitness subject to cross-examination, if his comment were to be received in evidence to prove the truth of whatever he was supposedly admitting when he said, "I know they are." Moreover, even if such evidence had been received, plaintiff's case would still have been insufficient.

3. Plaintiff next argues that the Federal Rules of Civil Procedure are unconstitutional because they confer too much discretion on trial judges. More narrowly, he argues that ap-

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[2] Cf. Rule 801(a)(2)(D), Proposed Federal Rules of Evidence. Plaintiff has not demonstrated that Johnston's statement concerned a "matter within the scope of his agency or employment." *Ibid.* Thus, even under the modern approach as represented by the proposed rules, the evidence is inadmissible hearsay. See the Advisory Committee Note to Rule 801 (a)(2)(D).

pellate review of discovery orders is inadequate. We find no merit in this argument.

4. Plaintiff argues that a mistrial should have been granted because he was denied access to the reports of the investigators. Since the reports are not in the record, as we have already indicated, we assume that they were merely routine credit reports as the district court found, and therefore their unavailability did not require a mistrial.

5. Plaintiff argues that the invasion of privacy by means of obvious surveillance is actionable in tort. Assuming that this is so, dismissed of the Second Claim rested on a failure of proof, rather than an insufficient legal theory. This argument is therefore beside the point.

6. Finally, plaintiff argues that if he had not been intimidated, and if he had testified as a live witness in the New York litigation, the Trustee would have prevailed. We have two comments on this argument. First, even if the hypothesis is vaild, a different result in New York would not require or justify a different result in this case. Second, after reading Judge Pollack's analysis of the evidence in that case, and also plaintiff's testimony in this case, we doubt plaintiff's hypothesis.

The judgment is

AFFIRMED.

CAPTION

MOTION

Pursuant to Rule 34 FRCP plaintiff moves for production of documents, which defendant's counsel impliedly agreed at the deposition of a witness who had knowledge of their contents to produce at a later time by stopping the witness from testifying on the ground that the documents spoke for themselves. (Williams Deposition pp 6-8, copies of which are annexed hereto.)

Although since requested to produce the documents defendant's counsel has refused to abide by his agreement and has refused production of the documents.

The documents are reports to defendant by the Chicago representatives of the detective agency hired by the defendant to investigate plaintiff. These documents are relevant to the allegations of plaintiff that he was harassed by obvious surveillance by private detectives hired by defendant to intimidate plaintiff.

WHEREFORE, it is respectfully requested that defendant's attorneys be required to keep their agreement to produce the said reports of detectives and that otherwise this motion for production of documents be granted.

PATRICK J. HUGHES, JR
Attorney for Plaintiff
29 S. La Salle Street
Chicago, Illinois

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS – EASTERN DIVISION

Name of Presiding Judge, Honorable A.L. Marovitz

Cause No. 70C2814 Date: Sept. 28, 1971

Title of Cause: Hayne v The Boeing Co.

Brief Statement of Motion: Motion for Production Of Reports of Investigation

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Address of Moving counsel	P.J. Hughes, Jr. 29	(368-8285)
Representing	Plaintiff	
Names and Addresses of other counsel entitled to notice and names of parties they represent.	Fulhuber, Paust, et. al 208 S. LaSalle Street Chicago, Ill.	

Under motion of plaintiff for production of reports of investigation of plaintiff by defendant is denied

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

CAPTION

1. With respect to the reports from Investigative Associates referred to by Richard E. Williams at pages of his deposition taken on June 16, 1971:

a) How many reports are there?

b) With respect to each report, state:

(i) Its date;

(ii) To whom it is addressed;

(iii) How many pages it is;

(iv) If on a letterhead, the words comprising the letterhead;

(v) By whom it is signed and his title, if any (if by a corporation or partnership, the name of the entity, the name of the individual signatory and his title);

(vi) The names of any persons or companies referred to in the report;

(Vii) The present location of the originals thereof and whether Mr. Poust has copies thereof.

ANSWER

a) This question has been previously answered in other documents on file in this case.

b) (i) No answer si required to this question

pursuant to an order of the court entered September 28, 1971, denying discovery of any investigative reports prepared by and for attorneys with regard to pending litigation.

(ii) No answer is required to this question pursuant to an order of the court entered September 28, 1971, prepared by and for attorneys with regard to pending litigation.

(iii) No answer is required to this question purusant to an order of the court entered September 28, 1971, prepared by and for attorneys with regard to pending litigation.

(iv) Not applicable.

(v) The report is unsigned.

(vi) No answer is required to this question purusant to an order of the court entered September 28, 1971, prepared by and for attorneys with regard to pending litigation.

(vii) Plaintiff is aware of the answer to this question as a result of an *in camera* inspection on September 28, 1971.

2. Do any of the reports identify investigators who did surveillance of plaintiff and, if so, what are the names and addresses of said investigators together with the names of their immediate employers and the dates of such surveillance?

Answer: No.

3. Apart from the documents referred to in interrogatories 1 and 2, any documents exist reporting on investigation of Mr. Hayne at the instance of defendant or of Mr. Willaims' law firm and, if so, describe the documents and state the present location of the originals and copies thereof.

Answer: No.

John G. Poust

Wayne F. Plaza
Wayne F. Plaza

Attorneys for Defendant,
Boeing Company

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Wayne F. Plaza, being first duly sworn on oath deposes and says that he has read the above and foregoing Answers to Interrogatories by him subscribed and that the same are ture in substance and in fact to the best of his knowledge.

Wayne F. Plaza
Attorney for Dfeendant,
Boeing Company

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable A.L. Marovitz

Cause No. 70C2814 Date: May 18, 1971

Title of Cause. Hayne v The Boeing Co.

Brief Statement of Motion. Status Report

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and
Addresses of
moving counsel

Names and Addresses
of other counsel entitled to
notice and names of parties
they represent.

The parties shall complete all discovery by July 18, 1971 and submit the final pre-trial order on August 12, 1971 at 10:00 a.m.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called

CAPTION

The deposition RICHARD WILLIAMS taken by the plaintiff, via telephonic communications, pursuant to agreement of counsel on Wednesday, June 16, 1971, commencing at the hour of 12:20 o'clock p.m., before Paul D. Brookins, a Certified Shorthand Reporter and a duly commissioned Notary Public within and for the County of Cook and State of Illinois, at Suite 1776, 208 South La Salle Street, Chicago, Illinois.

PRESENT:

MESSRS. JOY AND WOLK,
(60 East 42nd Street
New York, N.Y. 10017), by
MR. JAMES V. JOY, JR.

and

MR. PATRICK J. HUGHES, Jr.,
(Suite 320, 29 South La Salle Street,
Chicago, Illinois 60602)
on behalf of Plaintiff;

MESSRS HACKBERT, ROOKS, PITTA,
FULLAGAR & POUST,
MR. JOHN G. POUST,
on behalf of Defendant.

MESSRS. HACKBERT, ROOKS, PITTS,
FULLAGAR & POUST,
(Suite 1776, 208 South La Salle Street,
Chicago, Illinois 60604), by
MR. JOHN G. POUST,
on behalf of Defendant.

* * * * * * *

(The witness was thereupon duly sworn.)

RICHARD WILLIAMS

called as a witness by the plaintiff herein, having been first duly sworn was examined, via telephonic communications, upon oral interrogatories, and he did thereupon depose and testify as follows:

DIRECT EXAMINATION

BY MR. JOY:

Q. Will you state your name and home address?

A. Richard Williams 2530 42nd West, Seattle, Washington.

Q. From 1963 through the completion in 1970 of the case of England, et al. versus Pan American World Airways, 63 Civil 2845 in the United States District Court for the Southern District of New York, you were the trial counsel most active in preparation and trial of that case for The Boeing Company, were you not?

A. Yes, I believe so, in company with my partner, Paul Coie.

Q. Did you employ or cause to be employed any detectives or private investigators to investigate Donald F. Hayne?

A. Yes.

Q. Were they instructed to make observations of Mr. Hayne, in other words to see him at some junctures goin and coming?

A. No, they were not.

Q. Were they provided with photographs of him?

A. No, they were not.

Q. Were they provided with written data describing him?

A. I believe I gave some background information as to his address and prior employment history with The Boeing Company at that time, but just a very general data.

Q. And remember you have counsel here. You are not your own counsel, so you may want to hesitate on this one. What are the names of the detective or investigators so employed?

A. I believe the name of the firm that I retained here in Seattle was Investigative Associates.

Q. What is their address?

A. Do you want to wait while I look it up in the phone book?

MR. POUST: No, we can get that for him.

MR. JOY: We will leave a blank in the deposition at this point for that.

A.

MR. POUST: This was going to be one of those one-question depositions. He wanted to ask you one question.

BY MR. JOY:

Q. Was any work done in the Chicago area?

A. I believe they obtained the services of a correspondent agency in Chicago.

MR. POUST: I am going to object to what the witness doesn't know of his own knowledge. If he saw or heard something happen, that is one thing, but I am going to object to the conclusion as to what they did.

* * * * * * *

BY MR. JOY:

Q. Did Investigative Associates provide you with any reports?

A. Yes, they did.

Q. Did those reports reflect employment of investigative personnel in Chicago?

MR. POUST: I object to that because the reports will speak for themselves.

BY MR. JOY:

Q. How many such reports did you get?

A. I believe two, to my recollection.

Q. And what are their dates?

MR. POUST: I have no objection if you know, but that will appear also, I presume.

BY THE WITNESS:

A. I don't recall. I believe my best recollection is 1964 and possibly one in 1965.

BY MR. JOY:

Q. Are those reports still in existence?

A. Yes.

Q. Do you still have the originals of the reports?

A. No, I do not.

Q. Where are the originals today?

A. I believe all I ever had were copies, and I have furnished those to Mr. Poust.

MR. JOY: I would request production of those.

MR. POUST: You have a right to do so.

MR. JOY: In other words, your position would be under normal Rule 34, I can have them?

MR. POUST: I won't produce them now during the testimony of Mr. Williams. He didn't make them.

MR. JOY: All right.

MR. POUST: If it was something prepared by him, that would be different.

CAPTION

This matter having come before the Court at a pretrial conference held pursuant to Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C., and James V. Joy, Jr. and Patrick Hughes, having appeared as counsel for the plaintiff and John G. Poust and Wayne F. Plaza having appeared as counsel for the defendant the following action was taken:

* * * * * * *

The following stipulations and statements were submitted, attached to, and made a part of this order:

(c) A written list or lists of the potential witnesses to be called by each party; Mr. Robert G. Johnston or other employees of the Boeing Company familiar with the facts.*

* * * * * * *

POTENTIAL WITNESSES FOR PLAINTIFF:

Palintiff;

Creditors of Plaintiff; identified in Defendant's Deposition of Mr. Hayne;

Detectives hired by Defendant to investigate Mr. Hayne as identified in answers to pending interrogatories.

* * * * * * *

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(1) Breach of Contract, personal injury, etc.

* See Page 7, infra

CAPTION

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause before the HON. WILLIAM J. BAUER, one of the Judges of said Court, and a jury in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, January 24, 1972, at the hour of 10:00 o'clock a.m.

APPEARANCES:

MR. JAMES V. JOY, JR.
60 East 42nd Street
New York, New York 10017

and

MR. PATRICK J. HUGHES
29 South LaSalle Street, Room 320
Chicago, Illinois 60602

appeared on behalf of the plaintiff;

MESSRS. HACKBERT, ROOKS, PITTS, FULLAGAR & POUST
208 South LaSalle Street, Room 1776
Chicago, Illinois 60604
BY: *MR. JOHN G. POUST and MR. WAYNE PLAZA*

appeared on behalf of the defendant

* * * * * * *

(Whereupon, the following further proceedings were had in chambers; to-wit:)

THE COURT: Under what theory do you think somebody ringing his door bell - how do you propose to connect it up with Boeing?

MR. JOY: I am sorry, your Honor. I am trying to get his testimony as to about twelve of these tiny incidents. I am not trying to be obstreperous.

THE COURT: Let us suppose he testifies to all of them. How do you get it tied into Boeing?

MR. JOY: In the deposition, your Honor. At the North State Parkway address, where the fellow was looking up and down the numbers and so forth there, that comes out in the cross examination of Williams that it appears in the detective reports. I have tried to get at the detective reports.

THE COURT: How can you get Boeing connected with somebody ringing the door bell at 3:00 o'clock? Give it to me again, slowly.

MR. JOY: I have about twelve instances of unusual surveillance aspects of the case.

THE COURT: Like what? Whether there is surveillance or not is immaterial.

MR. JOY: All right.

THE COURT: Does anybody acknowledge that they rang the door bell at 3:00 o'clock in the morning? Besides your witness, has anybody else said, "I rang the door bell at 3:00 o'clock in the morning"?

MR. JOY: No, they have not.

THE COURT: You do not know who rang the door bell?

MR. JOY: No, I do not.

THE COURT: How do you propose to tie it up to Boeing?

MR. JOY: At the State Street address, we definitely have the questioning of him about that, indicating that the man had been there.

MR. POUST: Of him mentioning Boeing?

MR. JOY: The inference from the Boeing attorney's questioning, at the time he was there.

If I may, your Honor, the other thing is that while he was being questioned, while Mr. Hayne was being examined in the deposition, I had a fellow in my office who had been an FBI agent and was following the examination of him by Williams in his deposition, which will also be coming into evidence. He gives the opinion that he was under investigation by Boeing.

THE COURT: If I understand the position of the defendants in this case correctly, they acknowledge the fact that Richard --

MR. POUST: Richard Williams.

THE COURT: the guy with two front names, went out and employed a detective agency to investigate him. That part is admitted.

That does not, however, mean in any way that they admitted they rang the door bell at 3:00 o'clock in the morning or the fact that somebody rang the door bell is the responsibility of Boeing or of the detective.

MR. JOY: I agree, but what I did in the case, with these events happening, I had another deposition of Mr. Williams, where Mr. Williams testified that he hired some Chicago agency. Now I asked for production of the reports, so I could have discovery of those people and I was denied the reports.

THE COURT: That still does not even get to the point of proving that Boeing had anybody to do the

ringing of the door bell. Just because you got frustrated in one area of discovery, it does not give you any right to leap over the hurdle that Boeing had responsibility as to the ringing of the door bell. We do not know who rang the door bell.

As a matter of practical fact, there may be a million phone calls made in the middle of the night, and nothing to ite it in. There may be door bells rung and nobody there. Even if you are being followed there, it does not necessarily connect it up unless there is a logical connection between the two and I certainly know of none we can supply from this record.

MR. JOY: That is what I said in the pretrial conference, not getting the detective reports, which were not required to produce.

THE COURT: I ruled on a number of objections to your questions, overruling the objections based upon the fact that you intended to tie it up. Now we arrive at the point of how do you intend to tie it up and you answer it cannot be done in a satisfactory manner saying "He will not tell me who did it." That is precisely what you have told me.

MR. JOY: The only thing I can do I want to be fair with you the best I can do is having had the instances come in, if Boeing does not want to have their men deny they had done it. they admitted they did the investigation. They admitted this.

MR. POUST: We do deny that.

THE COURT: As I gather, you think the burden of proof will shift to Mr. Poust to demonstrate that these incidents that you are describing were not the result of the actions of the detectives of the attorney hired by Boeing?

MR. JOY: That is right.

THE COURT: Is that your theory?

MR. JOY: That is the best I can do. I do not know how else, that we have got the ruling.

THE COURT: I do not either when I am presented with a fait accompli. Although I am faced with this, the rule says you have the burden of proving by a preponderance of the evidence as to the incidents that occurred that gave rise to whatever damages might arise and the preponderance to show the activity as to wrongful conduct on the part of the defendant. If this is the method of showing that, we will literally be wasting our time by permiting that evidence to go in, according to what you tell me. Nor am I prepared to say, as to your burden of going forward, that you have now met the burden of proof that is yours.

MR. JOY: It all goes back to the question of what happened in the discovery. I am trying to do my best not to take up too much of the Court's time.

NEW YORK COURT OF APPEALS

S. WALLACH COMPANY, INC.,
Appellant,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

Mo. No. 286

DECISION OF COURT OF APPEALS Jul 2 1973

Motion for leave to appeal denied with ten dollars costs and necessary reproduction disbursements.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Secpnd Judicial Department, held in Kings County on February 5, 1973

HON. J. IRWIN SHAPIRO, Acting Presiding Justice
HON. FRANK A. GULOTTA)
HON. MARCUS G. CHRIST) Associate Justices
HON. ARTHUR D. BRENNAN)
HON. A. DAVID BENJAMIN)

S. Wallach Company, Inc.,
Appellant,

v.

International Business Machines Corporation,
Respondent.

Order on Appeal from Order Civil Action or Proceeding

In the above entitled cause, the above named S. Wallach Company, Inc., having appealed to this court from an order of the Supreme Court Westchester County, dated March 6, 1972; the said appeal having been argued by James V. Joy, Jr., Esq., of counsel for the appellant and by Lawrence T. D'Aloise, Jr., Esq., of counsel for the respondent, due deliberation having been had on said appeal, and upon the court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby affirmed, with $10 costs and disbursements.

Enter:

Irving N. Selkin

Clerk of the Appellate Division

___A D 2d ___ A- January 15, 1973

1747 E/72 S. Wallach Company, Inc., appellant, v. International Business Machines Corporation, respondent

Order of the Supreme Court, Westchester County, dated March 6, 1972, affirmed, with $10 costs and disbursements. No opinion.

SHAPIRO, Acting P.J., GULOTTA, CHRIST, BRENNAN and BENJAMIN, JJ., concur.

February 5, 1973 S. WALLACH CO., INC. v INTERNAT'L BUSINESS MACHINES 1747 E/72

App. D3

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 4, 1973

Same Caption

In the above entitled cause, the above named S. Wallach Company, Inc., appellant, having moved to reargue the appeal from an order of the Supreme Court, Westchester County, dated March 6, 1972;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was dtermined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied, with $20 costs.

Enter:

Irving H. Selkin

Clerk of the Appellate Division

No. 2207

No. 2207 S. Wallach Company, Inc., appellant, v. International Business Machines Corporation, respondent.

Motion by appellant for reargument of appeal from an order of the Supreme Court, Westchester County, dated March 6, 1972.

Motion denied, with $20 costs.

SHAPIRO, Acting P.J., GULOTTA, CHRIST, BRENNAN and BENJAMIN, J.J., concur.

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CAPTION

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HAWKINS, J.

The defendant moves for "accelerated judgment," pursuant to "Article 32 of the C.P.L.R."

In this complaint alleging slander, the plaintiff, "a corporation organized under the laws of the State of New Jersey" [sic] states that it is engaged in "developing and selling computerized data particularly to the construction industry in the form of critical path scheduling." The substance of the alleged slander is that the defendant informed an officer of another corporation that it, meaning thereby the plaintiff, stated of the plaintiff that its "critical path scheduling is unsatisfactory to the defendant IBM." The complaint then pleads by innuendo that the alleged defamatory utterances was engendered by malice and was "particularly designed to do severe economic harm to the plaintiff in his [sic] profession."

The defendant urges, firstly, that the complaint fails to state a cause of action; secondly, that there is a meritorious, affirmative defense of qualified privilege; and, lastly, justification.

The complaint does not, in my opinion, state a cause of action. For an action in slander to be maintainable, it must be slanderous, per se. If innuendo must be pleaded so as to render actionable the non-salnderous per se utterance, special damages must be pleaded and proved. (See, Seelman, *The Law of Libel and Slander* [Revised Ed., Vol. 2, Ch. XIII; also, Ch. XX, Vol. I])

Apart from the foregoing general insufficiency, upon the submission, the defense of qualified privilege, assuming the matter com-

complained to be otherwise actionable, is a complete defense. At bar, there existed such, "corresponding interest or duty" as to render the situation privileged. (*Shapiro v. Health Ins. Plan*, 7 N.Y. 2d 56.) The rationale for the genesis and persistence of this complete defense in the law of defamation is there fully considered. (see, also, *Seelman, supra*, Vol. 2, Ch. XI.)

Respecting the third defense urged by the defendant, that of justification, in view of our above consideration of the two prior affirmative defenses, I do not deem it necessary to consider same.

We note, but do not comment upon the second paragraph of the complaint, which merely alleges plaintiff's corporate status as one organized under the Laws of the State of New Jersey, but does not contain the requisite further allegations mandated by Sec.1312 of the Business Corporation Law, to wit, that it has "been authorized to do business in this state and it has paid to the state all fees,penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation."

The defendant's motion is granted.

Submit order on notice.

Joseph F. Hawkins

J.S.C.

Dated: February 18, 1972

Appearances:

JOY AND WOLK, ESQS.
Attorneys for Plaintiff
60 East 42nd Street
New York, New York

CLARK, GAGLIARDI, GALLAGHER & SMYTH, ESQS.
Attorneys for Defendant
175 Main Street
White Plains, N.Y.10601

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

S. WALLACH, CO., INC.,

Plaintiff

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

----------x

COMPLAINT

Plaintiff, by its attorneys, Joy and Wolk, as and for its complaint herein, respectfully, alleges:

1. Defendant is a corporation organized in and existing under the laws of the State of New York having a place of business in the City and County of New York.

2. Plaintiff is a corporation organized under the laws of the State of New Jersey.

3. Plaintiff is in the business of developing and selling computerized data particularly to the construction industry in the form of critical path scheduling, utilizing computer equipment manufactured by the defendant. Critical path scheduling is a method whereby construction contractors can determine readily the progress of the construction work they have contracted to build, and to take corrective steps where necessary to assure that they will complete the work on time. From the inception of plaintiff's operations it had enjoyed a fine reputation in the construction in-

dustry for the production of sound and proper critical path scheduling.

4. On or about the 13th of March 1970 the plaintiff entered into a contract with the William L. Crow Construction Company for a good and valuable consideration whereby the plaintiff agreed to furnish critical path scheduling for one of the defendant's projects.

5. Thereafter on the 17th of March 1970 the defendant in the presence and hearing of William L. Crow of the William L. Crow Construction Company, maliciously spoke of the plaintiff in its said profession of preparing critical path scheduling for construction projects, the following defamatory matter: to wit, the plaintiff's critical path scheduling is unsatisfactory to the defendant IBM.

6. By said malicious publication the defendant meant and intended to mean that plaintiff was incompetent and incapable of preparing critical path scheduling utilizing the defendant's equipment. Since plaintiff was generally known to be a user, exclusively, of computing equipment designed, developed and manufactured by defendant IBM said defamatory publication was particularly designed to do severe economic harm to the plaintiff in his profession. This malicious publication was and is wholly false.

7. As result of said malicious publication not only was the contract described in Paragraph 4 hereinabove cancelled, but the plaintiff has been and is greatly injured thereby in its reputation and profession to its damage in the amount of $100,000.00.

WHEREFORE plaintiff demands judgment against said defendant in the amount of $100,000.00 for damage to its reputation and its profession; in the amount of $30,000.00 for special damage resulting from the loss of the William L. Crow Construction contract and the further loss of William L. Crow Construction Company as a client; and in the amount of $50,000.00 as exemplary damages, together with the costs of this action.

JOY and WOLK
60 East 42nd Street
New York, New York 10017
(212) OX 7-4080

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CAPTION NOTICE OF MOTION

- - - - - - - - - - - - -

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOSEPH A. RORICK, sworn to the 28th day of September, 1971, the affidavit of PETER J. WARE, sworn to the 27th day of September, 1971, and upon defendant's memorandum of law, and all of the pleadings, papers and proceedings heretofor had herein, the undersigned will move this Court, at a Special Term, Part I thereof, to be held at the County Court House, 166 Main Street, White Plains, New York, on the 19th day of October, 1971, at 9:30 c'clock in the forenoon or as soon therafter as counsel can be heard, for an order granting accelerated judgment to the defendant under Article 32 of the C.P.L.R., and for such other and further relief as may seem just and equitable to this Court.

PLEASE TAKE FURTHER NOTICE that answering affidavits are required to be served at least five days in advance of the return date of this motion, pursuant to Section 2214 of the C.P.L.R.

Dated: October1, 1971

Yours, etc.,

CLARK, GAGLIARDI, GALLAGHER & SMYTH
Attorneys for Defendant
175 Main Street
White Plains, N.Y. 10601

TO: JOY AND WOLK, ESQ.
Attorneys for Plaintiff
60 East 42nd St., New York, N.Y.

CAPTION

AFFIDAVIT

JOSEPH A. RORICK, being sworn deposes and says:

1. I am employed by the defendant INTERNATIONAL BUSINESS MACHINES CORPORATION as Director of Design and Engineering, and am familiar with the facts and circumstances which gave rise to the above entitled law suit.

2. This is a suit by the plaintiff corporation for alleged defamation by defendant IBM. The following circumstances and events led to the institution of this suit.

3. Plaintiff's complaint alleges that plaintiff is a corporation engaged in the business of preparing critical path method scheduling (hereinafter referred to as CPM) for building construction work. CPM is a method of scheduling construction work, wherein a logic diagram is prepared, showing the different construction activities and their relation to each other, together with a time duration for each activity. The information shown on the logic diagram is then processed by a computer with the end product being a list of all the construction activities with start and finish dates for each. CPM enables the Contractor to see at a glance which activities must be started before other activities can be begun and also which activities can be postponed or run concurrently with other parts of the work. CPM schedules also allow the contractor to better allocate his work force and to insure that the proper materials are present at the job site at the proper times. In addition, CPM scheduling is helpful in calculating the effect on the work schedule of proposed changes in planned activities.

4. CPM schedules are prepared before the job is begun and are used during the actual work as above mentioned. Since many factors such as work order changes, weather, strikes, etc., affect the progress of a construction

project, the CPM schedule must be brought up to date periodically. Many contractors perform their own CPM scheduling while others engage independent CPM firms such as the plaintiff.

5. All contractors carrying on construction work for IBM are required to submit Critical Path Method schedules for IBM's approval. IBM's construction contract obliges the contractor to submit with his CPM schedules a "network diagram," which means a diagram, showing the interrelationship between the various parts of the construction work. The contractor is required to submit to IBM a CPM schedule within two two weeks after award of a contract to maintain the schedule on a current basis. The contract further provides that the contractor shall submit to IBM an up-to-date CPM schedule at least once a month during actual construction. It should be noted at this point that bidders on IBM construction are required to prepare projected CPM schedules for submission with their bids.

6. Beginning with the year 1966 plaintiff from time to time been engaged by contractors, bidding IBM construction work, to prepare CPM schedules for their bids. In addition, plaintiff has been engaged by contractors during the course of IBM construction work to prepare and update CPM schedules.

7. In 1966 Wallach performed the scheduling service for Fred J. Brotherton, Inc., general contractor for the contruction of an addition to IBM's manufacturing plant in Kingston, New York.

8. In 1967 plaintiff performed the scheduling services for Stewart R. Muller Construction Company, Inc., general contractor in the construction of an addition to IBM's office building in Harrison, New York.

9. In 1969 plaintiff prepared a CPM schedule which was submitted with the bid of the Muscarelle Construction Company for construction of a new office building for IBM in White Plains, New York. Muscarelle was in fact awarded the contract by IBM but did not award the scheduling sub-

contract to plaintiff.

10. In June, 1969 Vappi & Company, Inc., was selected as general contractor for an IBM building at East Fishkill, New York. Plaintiff prepared the CPM schedule for that bid and was engaged by Vappi to perform the CPM work on the project.

11. In January, 1970 Vappi was awarded the contract for the construction of an IBM laboratory in Kingston, New York. Again plaintiff prepared the CPM schedule for the bid and was engaged by Vappi to perform the CPM work on that project.

12. On both the East Fishkill and Kingston projects, the CPM schedules prepared by plaintiff were unsatisfactory to IBM, principally because of plaintiff's failure to submit with the schedules an adequate network logic diagram to show the interrelationship between the various parts of the construction work.

13. In March, 1970 the Willaim L. Crow Construction Company was awarded the contract for the construction of an IBM office building in Sterling Forest, New York. Plaintiff prepared the CPM schedule for the bid on this project also.

14. Plaintiff alleges in essence in its complaint that on the 17th day of March, 1970 the defendant IBM (or a representative thereof) stated that the plaintiff's critical path scheduling was unsatisfactory to IBM in the presence and within the hearing of William L. Crow of the William L. Crow Construction Company.

15. Your deponent admits that on or about that date, he indeed did state to Mr. Crow that Wallach's CPM work was unsatisfactory to IBM. I said this because at that time Wallach's CPM submissions on the Kingston and East Fishkill projects were not satisfactory. This was so because of Wallach's failure to submit a proper logic diagram, despite many request by IBM and meetings in the attempt to make clear our needs to Vappi and Wallach.

16. Subsequently, IBM met again with representatives of Vappi and Wallach and we agreed to accept hand-drawn logic diagrams to accompany the CPM schedules on the East Fishkill and Kingston projects. And on April 7, 1970, both Vappi and plaintiff were so notified.

17. Thereafter, plaintiff requested your deponent to urge Mr. Crow to engage plaintiff and the Sterling Forest job. Accordingly, while I felt I could not insist that Crow, an independent contractor, engage plaintiff as one of his subcontractors, I did at that time write Crow that plaintiff's most recent CPM submissions satisfied IBM's requirements

18. The preceding discussion and the affidavit of PETER J. WARE amply illustrate that the statement made by IBM, as alleged in the complaint, was true and was not actuated by any malice or evil intent against the plaintiff. Rather, it was made solely in furtherance of the common business interests of defendant IBM and the William L. Crow Construction Company.

Joseph A. Rorick

JOSEPH A. RORICK

Sworn to before me this
28th day of *September, 1971.*

Robert S. Hansen

Notary Public

CAPTION

AFFIDAVIT

PETER J. WARE, being duly sworn, deposes and says.

1. I have been employed by the defendant IBM CORPORATION in the Real Estate and Construction Division (RECD) in various capacities for the last sixteen years. Due to the large amount of construction carried on for IBM, this division was set up to supervise all construction projects and to insure that these projects are executed as efficiently and as speedily as possible. In order to carry out this function, RECD has required all contractors in IBM projects to use CPM schedules in order to effectively plan to course of construction activities before actual construction has begun.

2. During my tenure in the RECD I have been project construction manager on many IBM projects. For two years I was also in charge of CPM scheduling for IBM construction. In that capacity I was responsible for the review of CPM schedules on all IBM construction projects.

3. A CPM schedule should display in grapic form all of the construction activities necessary for the completion of the job, the length of time required for the completion of each activity, and most importantly, the interrelationships between the activities (i.e., the dependency of activities on one another during construction). The CPM schedule as above described is called a logic network diagram. A copy of a simple CPM schedule is attached hereto for the court's convenience. (Attachment 1)

4. The general construction contract used in all IBM construction projects requires that the CPM schedules be submitted in the form of network diagrams. Although other methods besides network diagrams have been used in CPM scheduling, it has been determined by IBM that the network diagram method is the most efficient and effective method

for IBM projects.

5. In late 1969 I reviewed the CPM schedule submitted by the Wallach Company for the East Fishkill project. This schedule was basically a time-scaled bar chart and not a logic network diagram. Although plaintiff's schedule did identify the individual activities of work and the time required for each activity, the manner of showing the dependency of one activity upon another and the interrelationships of these activities was difficult to follow and the schedules could not be used in the field because their interpretation required continuous crossreference to the computer print-out. The schedule therefore failed to meet IBM requirements.

6. However, at the request and insistence of Mr. Wallach, his form of schedule was used on the Fishkill project for a trial period of three months. In the meantime, the Wallach Company submitted the same type of schedule for the Kingston construction project. During the above mentioned three-month period, it was ascertained that the Wallach Company's method was not workable on IBM projects. Other IBM employees familiar with CPM scheduling reviewed the Wallach Company submissions and came to the same conclusion as I did.

7. Subsequently, in late March, 1970, plaintiff submitted a hand-drawn network diagram for the East Fishkill project and I was requested to review same. Although there were certain deficiencies in this submission, it was a marked improvement over the previous schedule in that it could be followed and understood without an unreasonable amount of study or effort. The diagram indentified the individual activites of work that were involved in constructing the project, and displayed the sequence of activities in such a manner that the interrelationship between activities could be quickly determined and understood. The latter inclusion was significant in that previous diagrams offered by the plaintiff were lacking in this important detail.

8. Long before the commencement of construction, RECD must make firm commitments as to a definite completion date to the divisions of IBM which will move into the new building. It is imperative, therefore, that the CPM schedule provide the detailed plan of activites for completion of the task by the specified date. The Wallach Company CPM submissions on the Fishkill projects, prior to the time that they began submitting hand-drawn network diagrams, did not provide such a detailed plan in easily readable form. These submissions did not satisfy IBM requirements for this reason.

9. No statements were ever made by myself to Mr. William L. Crow about the quality of the Wallach Company's work. However, the fact is that plaintiff's submissions were unsatisfactory for IBM purposes at the time Mr. Rorick stated to Mr. Crow that plaintiff's critical path scheduling was not satisfactory to IBM.

Peter J. Ware
PETER J. WARE

Sworn to before me this
27th day of *September, 1971.*

Robert S. Hansen
Notary Public

CAPTION

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR ACCELERATED JUDGMENT

SAMSON J. WALLACH, being sworn says:

1. I am president of S. Wallach Company, Inc., the plaintiff herein, and I make this affidavit in oppositon to defendant's motion for accelerated judgment.

2. The affidavits of Joseph A. Rorick and Peter J. Ware ask that they be accepted as experts on the Critical Path Method and the meaning of terms associated with it. I submit that their backgrounds as experts and their knowledge of the terms discussed by them has not been established in the affidavits, which beg the question of their qualifications. The best that can be said for both affidavits is that the second of the affiants has on occasion read Critical Path Schedules, which is like a periodic reader of the New York Times setting himself up as qualified to be editor. From all that the Court is told, Mr. Ware has never prepared a CPM schedule. Furthermore, the exhibit attached to his affidavit is misleadingly simple and shows a project of the complexity of a one car windowless garage.

3. At the end of page 2 of his affidavit, Mr. Rorick writes about the contents of IBM construction contracts and characterizes language of those contracts. This violates the Best Evidence Rule and is an attempt to place on Plaintiff the burden of producing IBM's documentation. If plaintiff has to, it will do so by supplemental affidavit at the time of oral argument of motion.

4. In referring to Stewart Muller's employment of plaintiff, Mr. Rorick at page 3 omits mention of the IBM change to the work and failure to provide computer time to Stewart Muller to revise its CPM schedule to reflect the change. The Stewart

Muller contract provided that such computer time would be made available to the contractor. Instead, the work was done for Stewart Muller by plaintiff. Stewart Muller considered that plaintiff's cost should be borne by IBM and plaintiff was drawn into a dispute between Stewart Muller and IBM. In addition to becoming provoked by the time consumed by its personnel in the dispute, IBM's Real Estate Department became embarrassed by having to remove reference to availability of computer time form its future construction proposals. Before the Muller incident, plaintiff had no trouble with the IBM Real Estate Department and afterward was continually harassed.

5. Many references are made in the affidavits to purported "dissatisfaction" by IBM with plaintiff's CPM schedules but nowhere do the affidavits show an IBM right to reject plaintiff's work for subjective dissatisfaction. The admitted statement of Mr. Rorick is pleaded in the complaint in a context of inuendo and I submit that the inuendo would be shown if a) plaintiff's work satisfied IBM's contract and b) an IBM representative said IBM was satisfied without cautioning his listener that plaintiff nevertheless had complied with its contractual obligations. IBM has over 70% of the American computer market giving it an unmatched opportunity to hurt a computer service company by disparaging statements.

6. At the top of page 4, Mr. Rorick is wrong in asserting that the CPM schedules prepared on the East Fishkill and Kingston projects were unsatisfactory to IBM, the same systems used by plaintiff on the Stewart Muller and East Fishkill projects was used on the Kingston project and until the William Crow matter there was never any criticism of the East Fishkill project.

7. In order to give the appearance of contractors being dissatisfied with plaintiff, Mr. Rorick at page 3 of his affidavit made reference to Muscarelle Construction Co. What he failed to point out, however, was that IBM had shown the representative of Muscarelle a CPM schedule

of another company that prepares Critical Path Schedules (Wagner-Holmes) and Muscarelle hired Wagner Holmes based on being shown its schedule by the IBM representative.

8. In the last sentence of page 4, Mr. Rorick refers to many request by IBM for submissions by plaintiff, the fact is that there was never any question as to the quality of plaintiff's work until after plaintiff asked for redress on the Crow matter. When it came up, plaintiff was completely absolved of any charge of poor quality at a meeting with IBM.

9. In the next to last paragraph of his affidavit, Mr. Rorick makes reference to a letter to the William L. Crow Company but does not attach the letter to his affidavit. It was not attached because it is a cold one-sentence letter that shows the continuing disdain of IBM's Real Estate Department towards plaintiff. If necessary, plaintiff will present a copy of the letter to the Court by supplemental affidavit.

10. Both affidavits fail to point out that the equipment utilized by plaintiff has been IBM equipment. Affiants have neither established that they are really speaking for IBM nor have the concurrence of IBM's computer marketing and engineering departments.

11. The principal equipment was an IBM 1130 engineering computer sold to plaintiff before programs were available to do any CPM work. Plaintiff prepared the type of programs of CPM that the IBM representative indicated would eventually be issued by IBM. Such programs were issued and defendant's opposition to plaintiff's method is also a complaint against such programs. Such sale of the equipment, with such anticipated computer programs, estops the Real Estate Department from taking such a position of dissatisfaction for IBM.

12. Referring again to the attachment to Mr. Ware's affidavit, it shows 30 activities whereas an IBM construction project has approximately 2,000 activities, which instead of being 70 times more complicated are geometrically more complicated or something in the order

of 700 times more complicated.

13. Plaintiff denies that IBM's contracts which are not before the Court, require a logic network diagram as contended by Mr. Ware without a showing of his qualifications to interpret the unpresent documents.

14. There are three basic systems of CPM, whic have evolved over the years in the following order: Pert, I-J and Precedence, the latter at the instance of IBM and its so-called Third Generation computers. What the Court is being faced with is the spectacle of IBM's Real Estate Department not accepting the technological advance accomplished by its engineering and marketing departments. As a matter of fact, refusal to accept the Precedence CPM's calls into question whether Mr. Ware and Mr. Rorick and the personnel of the IBM Real Estate Department as distinguised from the IBM technological departments ever really understood the I-J networks, because, if they did, the superiority of the precedence CPMs would be apparent.

15. I-J CPMs are useful to understand the interrelationships of the activities of the project. Once construction has commenced on the project, the value of the interrelationships becomes substantially less important and the actual day to day schedule becomes paramount to the operating owner such as IBM. The latter is the emphasis of Precedence CPMs since logic and interrelationship are already fully taken into account in the preparation of the CPM Schedule and the principal need for a CPM is for utilization by construction field personnel at the various projects. In fact the capability throughout a job of interrelating and coordinating the project for changes was accomplished by us at the computer in a matter of less than an hour whereas a newly redrafted I-J network might well require two weeks to develop the same information, which IBM does not deny was available. This was a principal selling point of IBM to us when we acquired the 1130 computer.

Samson J. Wallach

SAMSON J. WALLACH

JAMES V. JOY, JR.
Attorney at Law
60 East 42nd St.
New York, N.Y. 10017

December 22, 1971

Hon. Joseph Hawkins, Justice
Supreme Court of the State of New York
Court House
Poughkeepsie, N.Y.

re: *S. Wallach Co. v. I.B.M.*

Dear Judge Hawkins:

Last Tuesday, I returned a telephone call from Mr. Collins and gave information to him concerning the filing of our memorandum in reply to IBM's Memorandum of Law.

I advised Mr. Collins that there was an error in our brief and that I would communicate with IBM's counsel the substance of it before stating it to him or you. I spoke to Mr. D'Aloise on last Wednesday and advised him that the citations at page 5 of our Reply Brief to the *Tollefsen* and *Trim-A-Way* cases stood for the proposition the plaintiffs in those cases would have stated good causes of action if they had pleaded special damages (as has been done by plaintiff in this case) and that individual page citations supported this proppsition.

I mentioned to Mr. Collins that this might be embodied in a brief answering IBM's Reply Brief. Mr. Collins pointed out that the exchange of briefs has to end some place or it could go on forever.

Assuming it is not in order for us to reply to IBM's latest brief, I do wish to point out that the parties are now at the point where oral argument would be beneficial. The earlier oral argument, in the absence of prior service of IBM's brief could not be effectual. We stated this in our answering papers following an application to the Court on October 19 (when another judge was sitting) for earlier service of IBM's

original legal memorandum. The judge then sitting said we did not need the legal memorandum because we should be able to figure out what was in it. Any one looking at the papers would have to agree that IBM's memorandum was not predictable.

We feel, and wish by this letter to reiterate the position stated by us on two earlier occasions (the October 19 request and our original answering papers), that the practice in New York of allowing parties moving for Summary Judgment to defer service of original legal memoranda until the day of oral argument is a denial to their adversaries of due process since the adversaries are prevented from engaging in effective oral argument.

The remedy would be to allow further oral argument. We make such request only in the event that you believe IBM's motion has a substantial possibility of being granted.

At such oral argument, I could deal with IBM's Reply Memorandum, which really is an affidavit in opposition to Mr. Wallach's affidavit and which incidentally seeks to chastise Mr. Wallach for stating conclusions without admitting that Mr. Rorich's and Mr. Ware's affidavits only stated conclusions that differed from those in Mr. Wallach's affidavit only by being more ultimate conclusions.

Respectfully yours,

James V. Joy, Jr.

James V. Joy, Jr.
Attorney for Plaintiff

JJ:cj

APPELLATE DIVISION CAPTION

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR REARGUMENT

* * * * * * *

Absence of Complaint from Record on Appeal

At oral argument Plaintiff-Appellant's counsel pointed out the absence in the records of the Supreme Court, Westchester County, of the copy of the Complaint and pointed out that an *ex parte* communication had occurred between Judge Hawkins' law clerk and counsel for IBM pursuant to which Judge Hawkins was sent a copy of the complaint.

If the copy of the complaint relied upon by Judge Hawkins in granting summary judgement had been included in the court records of this case, Plaintiff-Appellant would have waived the *ex parte* manner in which the complaint was obtained.

IBM, and apparently this court, have treated Plaintiff's objection as merely raising the question of whether the lower judge had before him an accurate copy of the complaint.

The objection, however, goes much further since it represents the invoking of the right of a litigant to see every bit of documentation (except a judge's personal notes) relied upon in reaching a judgment against him. Knowing the contents is not enough. The litigant has a right to inspect such documentation to assure himself of its authenticity and completeness.

In all candor, Plaintiff-Appellant must state what it be lief that what occurred is a concession to IBM, whose presence in Westchester County is a dominant presence, that would not be granted most other litigants in cases pending in the Supreme Court, Westchester County.

Defendant-Appellee had a simple method of avoiding

the right here being *invoked* by Plaintiff-Appellant. Defendant-Appellee could have attached a copy of the Complaint to its accelerated judgment papers (as was suggested to it by Appellant before oral argument and was assumed to have been done by Appellee).

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F-1 (App. E is Omitted)

RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS
(Appendix A, Armed Services Procurement Regulation)

5. *Dismissal for Lack of Jurisdiction.*—Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party, unless the Board determines that its decision on the motion will be deferred pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own motion to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

* * * * * * *

10. *Pre-Hearing or Pre-Submission Conference.*—Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative or upon the application of either party, call upon the parties to appear before a member or examiner of the Board for a conference to consider:

(a) The simplification or clarification of the issues;

(b) The possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;

(c) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;

(d) The possibility of agreement disposing of all or any of the issues in dispute;

(e) Such other matters as may aid in the disposition of the appeal.

The results of the conference shall be reduced to writing by the Board member or examiner in the presence of the parties, and this writing shall thereafter constitute part of the record.

* * * * * * *

14. *Depositions.*

(a) *When Depositions May Be Taken.* After an appeal has been docketed, the Board may, upon application of either party or upon agreement by the parties, permit the taking of the testimony of any person, by deposition upon oral examination or written interrogatories, for use as evidence in the appeal proceedings. Leave to take a deposition will not ordinarily be granted unless it appears that it is impracticable to present the deponent's testimony at the hearing of the appeal, or unless a hearing has been waived and the case submitted pursuant to Rule 11.

(b) *Before Whom Taken.* Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths.

(c) *By Oral Examinations.* When either party desires to take the testimony of any person by deposition upon oral examination, the moving party shall give

the opposite party at least 15 days written notice of the time and place where such deposition is proposed to be taken; the name, address, and title of the person before whom it is proposed to be taken; and the name and address of the witness. This notice is unnecessary in any case where the deposition has been scheduled by mutual agreement. If the party so served finds it impracticable to appear at the taking of the deposition, in person or by counsel, he shall promptly so notify the moving party who shall make available to him a copy of the evidence given at the deposition. Within 15 days after receipt of such copy, the party so served may serve cross-interrogatories upon the moving party, and proceedings shall be had thereon as provided in the next succeeding subparagraph (d) herein.

(d) *By Written Interrogatories.* When either party desires to take the testimony of any person by deposition upon written interrogatories, the moving party shall serve them upon the opposite party with a notice stating the name and address of the person who is to answer them and the name, address, and title of the person before whom the deposition is to be taken. Within 15 days thereafter, the party so served may serve cross-interrogatories upon the moving party. A copy of the notice and copies of all interrogatories served shall be delivered by the moving party to the person before whom the deposition is to be taken, and the latter shall proceed promptly to take the testimony of the witness in response to the interrogatories.

* * * * * * *

15. *Interrogatories to Parties; Inspection of Documents; Admission of Facts.*—Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be reviewed and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.

* * * * * * *

18. *Notice of Hearings.*—The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will give due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties. A party failing to acknowledge a notice of hearing shall be deemed to have submitted his case upon the Board record as provided in Rule 11.

* * * * * * *

20. *Nature of Hearings.*—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and respondent may offer at a hearing on the merits such relevant evidence as they deem appropriate and as would be admissible under the generally accepted rules of evidence applied in the courts of the United States in nonjury trials, subject, however, to the sound discretion of the presiding member or examiner in supervising the extent and

manner of presentation of such evidence. In general, admissibility will hinge on relevancy and materiality. Letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the generally accepted rules of evidence, may be admitted in the discretion of the presiding member or examiner. The weight to be attached to evidence presented in any particular form will be within the discretion of the Board, taking into consideration all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties.

* * * * * * *

28. Decisions of the Board will be made in writing and authenticated copies thereof will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board in Washington, D.C. In accordance with paragraph 3 of the Charter, decisions of the Board will be made upon the record, as described in Rule 13.

* * * * * * *

31. These revised rules shall take effect on the first day of the month following the month in which they are approved by the Assistant Secretary of Defense (Installations and Logistics) and the Assistant Secretaries of the Military Departments responsible for procurement. Except as otherwise directed by the Board, these rules shall not apply to appeals which have been docketed prior to their effective date.

Approved this 15th day of July 1963.

THOMAS D. MORRIS
The Assistant Secretary of Defense (Installations and Logistics)

PAUL R. IGNATIUS
The Assistant Secretary of the Army (Installations and Logistics)

KENNETH E. BeLIEU
The Assistant Secretary of the Navy (Installations and Logistics)

JOSEPH S. IMIRIE
The Assistant Secretary of the Air Force (Materiel)

CAPTION

MEMORANDUM AND ORDER

Plaintiffs have filed a "Motion Under Rule 59 FRCP That Judgment Against Plaintiffs Be Vacated And A Trial Ordered." This motion under Rule 59 is inappropriate under the circumstances where a motion for summary judgment was granted and judgment was entered for the defendants. However, even considering this motion as one made under Rule 60, F.R.Civ.P., this court believes it is without merit for the reasons previously given in an oral opinion on March 23, 1972 on the motions for summary judgment. Therefore, it is this 12th day of May, 1972, by the United States District Court for the District of Maryland.

ORDERED that plaintiffs' motion to vacate the judgment be, and it is hereby, denied.

James R. Miller, Jr.

James R. Miller, Jr.
United States District Judge